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# Decisions

## January 83

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the  
Ontario Labour Relations Board

Cited [1983] OLRB REP. JANUARY

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also reported in *Canadian Labour Relations Boards  
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**0803-82-R** John Heeney, Applicant, v. Labourers' International Union of North America, Local 183, Respondent, v. **Apex Services**, Division of 226023 Holdings Ltd., Intervener.

**Petition – Termination – Working foreman actively involved in origination and circulation of petition – No actual management involvement – Employee perception of management support causing Board to reject petition**

*(Editor's note: This decision was inadvertently omitted from the September, 1982 issue of the Report. However, it is of sufficient importance to be published at this time)*

**BEFORE:** M. G. Mitchnick, Vice-Chairman and Board Members J. A. Ronson and C. A. Ballentine.

**APPEARANCES:** John Heeney for the applicant; B. Fishbein and R. Quinn for the respondent; B. D. Mulroney, Crawford Ewington and Joyce Ewington for the intervener.

#### **DECISION OF THE BOARD; September 2, 1982**

1. This is an application for a declaration terminating bargaining rights, pursuant to the provisions of section 57 of the *Labour Relations Act*. Section 57(2) and (3), in particular, provide:

57.-(2) Any of the employees in the bargaining unit in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

(b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;

(c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continued to operate or after the



commencement of the last two months of its operation, as the case may be.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

2. The applicant, John Heeney, has been employed by the intervener, Apex Services, for seven years. Apex has both a construction and an irrigation division, and Mr. Heeney works primarily in the irrigation division. He handles the service work in that division, and formerly used a business card which read "Service Manager". He also drives the company vehicle. When he has an irrigation job which requires additional men (which has been rare recently), he "supervises" the other men on the job, making sure that the work is done correctly. Mr. Heeney is a member of the bargaining unit and pays dues to the union.

3. Mr. Heeney testified that he is just not happy with the union in the shop. He complained that he no longer receives statutory holiday pay, that the health and welfare benefits that he had were better before the union came in, and that he was laid off last winter for the first time in seven years. On cross-examination, however, Mr. Heeney admitted that he believed the holiday pay was included with the vacation pay which is paid twice a year, but added that he preferred to see the money each day as it came up. He further admitted that he had not looked at the collective agreement to see what the new health and welfare benefits were, and that he had not bothered to go to the meeting which the union held to explain the contract at the time it was signed. Mr. Heeney testified that he did not want the union in the first place, and had never been approached by the other men to sign a card. Finally, Mr. Heeney acknowledged that the layoff in December was the result of the economy, and that there was nothing to suggest that it arose from the company having the union in.

4. The company is owned and managed by Crawford Ewington and his wife. Asked if there were any managers beside the Ewingtons, Mr. Heeney replied that there was only the foreman, Carl Dorion. He testified that the Ewingtons looked after the hiring and firing for the company, but that "if someone really got out of line, Carl would have the authority to fire". Questioned further by company counsel, Mr. Heeney stated that Carl had not actually fired anyone to date, and that he would generally expect Carl to report incidents to the Ewingtons rather than taking action on his own. Mr. Dorion himself testified that he was simply a "working" foreman, and that he assigns the men to their jobs in the morning at the shop, and then goes out on a job himself, usually with one other employee. Like Mr. Heeney, Mr. Dorion is a member of the bargaining unit and makes all of the usual contributions to the union. Mr. Dorion was also included in the layoff last winter.

5. In the words of Mr. Heeney, it was Mr. Dorion and himself who “started the ball rolling” on this application. Mr. Heeney and Mr. Dorion first discussed the question of getting rid of the union between themselves, and Mr. Dorion suggested the next step was to raise it with the other men in the shop. Mr. Heeney and Mr. Dorion discussed wording for a petition, and Mr. Dorion wrote out the following words on a piece of paper:

WE AT APEX SERVICES LTD., 3344 MAVIS ROAD, MISSISSAUGA, ONTARIO L5C 1T8, DO NOT WANT TO BE REPRESENTED BY L.I.U.N.A. LOCAL 183 OR TRUST ADMINISTRATION, MURRAY G. BOLGER ADMINISTRATION SERVICES LTD., 1136 DUPONT STREET, TORONTO, ONTARIO M6H 2A2, OR ANY OTHER LABOUR UNION.

Mr. Heeney could not remember where he got the reference to “Murray Bolger and Associates”, but said that it must have been when he asked for his vacation pay in July. Mr. Heeney and Mr. Dorion showed the petition to the other men during a coffee break at the Red Wagon restaurant in Mississauga. According to Mr. Heeney, the meeting was led equally by himself and Mr. Dorion, and the complaints cited earlier were discussed, together with the payment of \$10 a month to the union. Mr. Dorion then placed the petition on the table and said: “There it is, boys; sign it if you want to”. Mr. Dorion signed it first, and Mr. Heeney after him. The other four men in the coffee shop then signed. Mr. Heeney testified that no advance notice was given to the men of the meeting in the restaurant, and that the decision to discuss the petition that day was spontaneous. All of the men were working on different jobs in the area, and Mr. Heeney testified that they all happened to arrive for their break at the same time on the day that the shop steward was absent and Mr. Heeney had the petition in his pocket. One other employee was not in fact at the restaurant because he was assigned to a location elsewhere, and Mr. Dorion pulled him off the highway on the way home and obtained his signature on the petition. The completed petition was then mailed to the Board by a friend of Mr. Dorion.

6. On the basis of the foregoing, the respondent raised a number of arguments against the petition, but the primary one stems from the role played by Mr. Dorion, the foreman. The Board was confronted with a similar dilemma in *Joseph Foley*, [1980] OLRB Rep. Oct. 1347, and had this to say:

7. This then brings us to the issue of whether the statement of desire can be accepted as voluntary signification of those who signed it. The Board is always concerned that employees may have signed such a statement of desire out of the belief that it had the support of management and that management might become aware of any refusal on their part to sign it. It is worth noting at the outset that we are fully satisfied that there was no actual managerial involvement in either the preparation or circulation of the statement of desire. Notwithstanding the lack of any evidence indicating actual management involvement, counsel for the union contended that employees would likely have perceived that management was involved with the statement of desire because of the leading role

played by Mr. Foley in its origination and circulation and the fact that Mr. Foley is employed as a working foreman.

8. Mr. Foley is a member of Local 200 who is paid an hourly rate pursuant to the terms of the collective agreement. He is regarded as a bargaining unit employee and does not exercise any managerial functions. However, as a working foreman, Mr. Foley does perform certain supervisory functions. He is responsible for assigning work to employees in his crew and also for pointing out to them any errors which they may have made. Mr. Foley makes reports to management on the work performance of other employees. Mr. Foley does not become directly involved in discussions relating to the hiring and firing of employees. However, it is reasonable to assume that his reports concerning employee work performance are taken into account by management when it considers its staffing requirements.

9. Mr. Foley and another employee, Mr. J. Shipperbottom, were the ones who originally decided to seek to terminate the union's bargaining rights. Although they first met as employees of the intervener, Mr. Foley and Mr. Shipperbottom are personal friends outside of the work place. According to Mr. Foley, the reason for the decision to seek to terminate the union's bargaining rights was the feeling that union representation acted to restrict the work opportunities available to the intervener's employees. Mr. Foley made particular reference to a job at Eatons' Bayshore in Ottawa. According to Mr. Foley, he and the intervener's other employees had been working at this job for some period of time when they were laid off for five to six weeks while employees of another firm were brought in to perform some sheet metal work. Mr. Foley indicated that he felt that he and the intervener's other employees could have performed this work themselves, and that to his mind the reason they were not asked to do so was because the work was not covered by their collective agreement. Mr. Foley testified that after he and Mr. Shipperbottom decided to seek to terminate the respondent's bargaining rights, they discussed the matter with the other employees and then retained the services of a lawyer who had recently acted on Mr. Shipperbottom's behalf in a real estate transaction. The lawyer prepared the statement of desire, which was later signed by the employees in the presence of both Mr. Foley and the lawyer.

10. In assessing the voluntariness of the statement of desire, we are unable to accept the proposition that Mr. Foley stands in the same position as any other employee in the bargaining unit. Because of his supervisory functions, Mr. Foley's active involvement with the statement of desire raises concerns which would not exist if he were other than a working foreman. However, we also do not believe that his involvement with the statement of desire must



invariably result in a finding that it cannot be given any weight. Rather, *what is required is an examination of all of the surrounding circumstances and an assessment of whether other employees would likely have viewed Mr. Foley as acting on behalf of, or with the support of management, or whether they would likely have perceived him as a bargaining unit employee seeking only to further his own self-interests.*

11. Employees would have been well aware of Mr. Foley's supervisory role, particularly in assigning work. They would also likely have been aware of the fact that he was responsible for making reports to management concerning their work performance. It is also reasonable to assume that the other employees would have known that notwithstanding his status as a working foreman, Mr. Foley, like themselves, was a union member within the bargaining unit. The evidence does not suggest that Mr. Foley did anything to indicate to the employees that he was acting on behalf of management. To the contrary, his case in favour of terminating the respondent's bargaining rights was based upon his view that union representation had acted to restrict the work available to himself and others. Along with the other employees he had been laid off for five or six weeks under circumstances where he felt he need not have been, and he blamed the existence of the collective agreement for this fact. When all of these considerations are taken into account, we feel that the other employees would more likely have regarded Mr. Foley as acting in what he perceived to be in his own interests rather than acting on behalf of management.

(emphasis added)

7. In the present case, the Board has asked itself the same question as in *Foley*, but is forced to arrive at a different conclusion. To begin with, the grounds set forth by Mr. Heeney before the Board in support of his efforts to rid the company of the union would seem to be less readily apparent to other employees in explaining the motivation of himself and Mr. Dorion than the common incident which took place amongst employees in the *Foley* case. In this regard, Mr. Heeney conceded that the shop employees do probably continue to receive the full amount of holiday pay, that he was in fact unaware of the benefits provided by the collective agreement, and that no blame could be attached to the union for the layoffs which occurred this last winter. Beyond this, the Board has concerns that Mr. Dorion, on the evidence, is in a position of greater influence over the employment conditions of other employees than was the working foreman in the *Foley* case. There formerly was a "Head" Foreman at the respondent's shop in addition to Mr. Dorion's predecessor, but that individual is gone now and Mr. Dorion is the only supervisor over the employees apart from the two owners. It is not without significance to the Board that Mr. Heeney himself, a long-service employee with supervisory responsibilities of his own, initially volunteered his expectation that Mr. Dorion would have the authority to fire an employee in an appropriate case.

8. Mr. Dorion was a driving force behind the decertification application from the beginning, and was prominently involved at every stage when employees were being asked to sign the petition. In the Board's view, it was not a credible test for employees to be asked to declare their loyalties by Mr. Dorion as they were. Because of his involvement, the Board finds it impossible to conclude that the expression filed with the Board in support of this application is a voluntary one, notwithstanding the absence of culpable conduct on the part of the employer. As a result, the statutory precondition to the testing of this question of representation has not been established.

9. The application must be dismissed.

#### **ADDENDUM OF BOARD MEMBER JAMES A. RONSON;**

1. I agree with the disposition of this matter, but have a few comments in addition. With respect to issues arising from section 1(3)(b) of the Act, it has always been my position that persons who can impose discipline upon bargaining unit employees, or who can "effectively recommend" that such discipline be imposed, fall within the exception outlined in that section and cannot be members of the bargaining unit.

2. We heard evidence from Mr. Heeney that Mr. Dorion can discipline in exceptional circumstances and that the owners would back him up if he made a recommendation that someone be disciplined. Given that evidence, the application cannot succeed since an employee exercising managerial functions is one of the instigators of the statement of desire.

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**1776-82-R** Service Employees International Union, Local 663 A.F. of L., C.I.O., C.L.C., Applicant, v. **Belleville General Hospital**, Respondent

**Bargaining Unit – Practice and Procedure – Existing full-time unit not containing restriction by municipal designation – Board mirroring part-time unit similarly – Deviating from usual municipal-wide description**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members F.W. Murray and C.A. Ballentine.

**APPEARANCES:** *D.J. Burshaw and Norman Dunlop for the applicant; John Wakely and Gary V. Williams for the respondent.*

**DECISION OF THE BOARD;** January 14, 1983

1. This is an application for certification in which the applicant seeks to be certified for a unit of part-time office and clerical employees. The full-time office and clerical employees of the respondent are represented by the applicant union and covered by a subsisting collective agreement.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The parties are in dispute as to the geographic scope of the bargaining unit. The applicant seeks a unit which is not restricted by a geographical designation. The respondent, on the other hand, seeks to have the bargaining unit circumscribed by the usual reference to the municipality within which the employees for whom the applicant seeks bargaining rights work. As part of the Belleville General Hospital there is an out-patient facility in Trenton, Ontario and a mental health facility in Bancroft, Ontario. Other than for these two facilities, the hospital is situated within the Municipality of Belleville, Ontario. There are no part-time office and clerical employees presently employed at either of the facilities located outside Belleville.

4. In the normal course, the Board would follow its long-standing practice and describe the unit as encompassing all employees of the respondent within the municipality. However, in this case the unit of full-time office and clerical employees as set out in the collective agreement covering the full-time office and clerical employees is described as “all employees of the Belleville General Hospital employed as office and clerical staff save and except...” There is no municipal designation contained in the bargaining unit description covering the full-time office and clerical employees of the respondent. Generally, the Board attempts to “mirror” full-time and part-time unit descriptions as was made clear in the recently released *Sudbury Memorial Hospital* case, [1982] OLRB Rep. Nov. 1722 as follows:

“The Board has, absent any unusual factors, generally followed a policy of having part-time units, organized at the same time or subsequent to the full-time unit “mirror” the full-time unit. No cases were cited to the Board where the Board has done otherwise...”



The primary purpose of the Board's approach in this regard is to avoid a multiplicity of bargaining units and to thereby foster more effective and more efficient collective bargaining. If we were not to mirror the full-time and part-time office and clerical units in this case, the possibility of two additional part-time units (in Trenton and Bancroft) in respect of the same work locations covered by a single full-time unit, would exist. In these circumstances, we have decided that the part-time unit of office and clerical employees should mirror the full-time unit and accordingly, we hereby find that all office and clerical employees of the respondent employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on December 24, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. A certificate will issue to the applicant.

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**0707-82-R;** The United Headwear, Optical and Allied Workers Union of Canada, Local 3, Applicant, v. **Biltmore/Stetson (Canada) Inc.**, Peat Marwick Limited, as Receiver and Manager of Biltmore Hats, a Division of Biltmore Industries Limited and Thorne Riddell Inc., Trustee of Biltmore Industries Limited, Applicant, v. Hat Workers Union Local 82, of the United Hatters, Cap and Millinery Workers International Union, Intervener

**Certification – Sale of a Business – Timeliness – Incumbent union giving notice to bargain to successor employer – s.63(10) precluding displacement applications for one year period – Whether notice given day before formal sale transaction closed ineffective – Whether notice given to non-existent company – Board finding displacement application untimely**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members W.G. Donnelly and B. L. Armstrong.

**APPEARANCES:** *M. Zeigler for the applicant; Norman B. Irwin for the respondent; Douglas J. Wray for the intervener.*

**DECISION OF THE BOARD;** January 19, 1983

1. This is an application for certification
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The applicant union, the United Headwear, Optical and Allied Workers Union of Canada, Local 3, has applied to become the exclusive bargaining agent for all employees of the respondent below the rank of foreman, save and except staff, truck drivers and those engaged in a supervisory or confidential capacity. It seeks to displace the bargaining rights of the incumbent union, the Hat Workers Union Local 82, of the United Hatters, Cap and Millinery Workers International Union, which has filed an intervention in this matter.
4. The intervener argues that the application of the United Headwear Union Local 3 is made untimely through the operation of section 63 of the Act, the relevant portions of which are set out below:

63.-(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his

business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade union continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice under section 14 or 53, as the case requires.

• • •

(10) For the purposes of section 5, 57, 59, 61 and 123, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 7.

Section 5(2) of the Act describes an effect of certification under section 7:

*5.-(2) Where a trade union has been certified as bargaining agent of the employees of an employer in a bargaining unit and has not entered into a collective agreement with the employer and no declaration has been made by the Board that the trade union no longer represents the employees in the bargaining unit, another trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit determined in the certificate only after the expiration of one year from the date of the certificate.*

[emphasis added]

Pursuant to section 63(3) of the Act, where an employer whose employees have been certified by the Board sells his business, the trade union holding bargaining rights is entitled to give written notice of its desire to bargain to the person to whom the business has been sold. Section 63(10) provides that when notice has been given by a trade union under section 63(3) that notice, for the purposes of a subsequent



application for certification, shall have the same effect as a certification under section 7 of the Act. Section 5(2) of the Act provides that where a union has been certified pursuant to section 7 and has not entered into a collective agreement with the employer and no declaration has been made by the Board that the union no longer represents the employees in the bargaining unit, no other union may apply for certification for one year. Accordingly, section 63(10) stipulates that when notice to bargain has been given to the employer to whom the business has been sold by the union representing the employees in the bargaining unit, the notice precludes another trade union from applying for certification for one year.

5. In the instant situation the Hat Workers Union, Local 82 had entered into a collective agreement with Biltmore Hats, a Division of Biltmore Industries Limited effective from June 1, 1980 through May 31, 1982. While the various parties to this proceeding may have differing views as to the precise date that the sale of the business took place, it is common ground that a sale of a business within the meaning of section 63 of the Act occurred wherein the business of Biltmore Hats, a Division of Biltmore Industries Limited was sold to Biltmore/Stetson (Canada) Inc., by Peat Marwick Limited, the entity appointed receiver manager of Biltmore Hats by the Canadian Imperial Bank of Commerce and Thorne Riddell Inc., the trustee in bankruptcy.

6. By a letter dated June 9, 1982 the Hat Workers Union, Local 82 gave notice to bargain to Mr. Gary Rosenthal, the president of Biltmore/Stetson (Canada) Inc., Counsel for the intervener argues that by the operation of section 63(10) of the Act, this notice bars an application for certification by any other union, including the applicant union, for a period of one year from the effective date of the notice. The United Headwear, Local 3's application for certification was filed on July 8, 1982. Accordingly, counsel for the intervener argues that it is untimely.

7. Counsel for the applicant union takes a different approach. He argues that the notice to bargain provided by the Hat Workers Union, Local 82 was itself untimely and is therefore unable to raise a bar to the instant application. He maintains that the intervener's notice to bargain pre-dated the sale of the business by at least two days, and possibly more, and is not, therefore, an effective notice to bargain for the purposes of section 63(10) of the Act. Counsel maintains, therefore, that the application for certification of the United Headwear, Local 3 has not been barred by the notice to bargain and is timely.

8. The details of how the business of Biltmore Hats ultimately became the business of Biltmore/Stetson (Canada) Inc. are somewhat complicated. For the purposes of determining the intervener's preliminary objection to the timeliness of this application for certification, it is unnecessary to do more than highlight the history of that transaction and the origination of the applicant union:

- (a) By a letter dated April 27, 1982 Anne-marie Corrigan (Maude), the president of the Hat Workers Union Local 82, gave a notice of its desire to terminate the collective agreement expiring May 31, 1982 and to meet to negotiate a renewal of the agreement. The notice was addressed to Biltmore Hats, a Division of Biltmore Industries Limited, Thomas Riddell Inc. (the Trustee

in Bankruptcy of Biltmore Industries Limited) and Peat Marwick Limited (the Receiver and Manager for Biltmore Hats).

- (b) On or about May 7, 1982 Mr. Sam Fox, the Canadian Director for the Amalgamated Clothing and Textile Workers' Union, was appointed trustee of the Hat Workers Union, Local 82.
- (c) At some point prior to April 27, 1982 Ms. Corrigan had started signing employees up as members of the United Headwear Union, Local 3, the applicant in this proceeding.
- (d) Prior to the instant application for certification, the United Headwear, Local 3 had filed three applications for certification all of which were withdrawn. One was dated June 8, 1982, another June 17, 1982 and still another was dated June 30th, 1982. The instant application for certification, then, is the fourth application for certification filed by the United Headwear, Local 3.
- (e) On March 6, 1982 the Canadian Imperial Bank of Commerce appointed Peat Marwick Limited as the receiver and manager of Biltmore Hats. Mr. Richard Harris, a chartered accountant employed by Peat Marwick, stepped in to manage and take control of the company on March 6, 1982.
- (f) As of March 6, 1982 all of the employees, save a core group of approximately 7, were laid off and the plant was shutdown effective March 8, 1982.
- (g) Subsequently, Thorne Riddell Inc. was appointed Trustee in Bankruptcy for the real estate owned by Biltmore Hats.
- (h) From and after March 6, 1982 Peat Marwick Limited, through Richard Harris, assumed the complete control of the business of Biltmore Hats. Their prime objective was to collect accounts receivable and find a buyer for the business.
- (i) In June of 1982 Peat Marwick Limited entered into serious negotiations for the sale of the business with a United States' company, Stetson Hat Company, Inc..
- (j) In the week prior to June 10th intensive purchase and sale negotiations took place between representatives of Stetson Hat Company, Inc. (namely, Mr. Gary Rosenthal, the President of Stetson, Mr. H. Grosse, the vice president and assistant secretary, and their lawyers) and representatives of Peat Marwick Limited (namely, Mr. Harris, representatives of the Canadian Imperial Bank of Commerce and their lawyers). The culmina-

tion of those negotiations was the signing of an agreement for purchase and sale dated June 10, 1982 between Peat Marwick Limited (Receiver and Manager of the Undertaking, Property and Assets of Biltmore Industries Limited) and Thorne Riddell Inc. (Trustee and Bankruptcy of Biltmore Industries Limited) as vendors and Stetson Hat Company, Inc., as the purchaser.

- (k) Mr. Richard Harris testified that the parties had agreed upon the terms of their agreement for purchase and sale prior to its signing on June 10th. He stated that the reason the agreement wasn't signed until June 10th was because the lawyers had to catch up with the actual drafting of the document.
- (l) A significant aspect of the June 10th agreement for purchase and sale is that it was conditional on the Federal Investment Review Agency (F.I.R.A.) granting approval for Stetson Hat Company, a U.S. based company, to operate the business in question in Canada.
- (m) F.I.R.A. approval was ultimately given in August and the sale formally closed on August 12, 1982.
- (n) Mr. Harris stated that if F.I.R.A. approval has not been necessary, the sale would have closed on June 10th. All other aspects of the sale were ready to proceed on June 10, 1982.
- (o) The agreement of June 10, 1982 provided that once the sale was closed, the effective date of the transfer of possession of the property would be deemed to have taken effect on June 11, 1982. From the effective date of June 11, 1982 until the time of closing the business was officially managed and operated by Peat Marwick. All acts and proceedings taken by Peat Marwick during that interim period, however, were taken pursuant to the June 10th agreement and made subject, thereby, to the prior approval of the purchaser, Stetson Hat Company. Moreover, apart from the core employees who had remained in place all along, the June 10th agreement stipulated that Stetson, during the interim period, would fund, among other things, all wages for the employees who were recalled, all purchases of inventory and supplies, all utility charges and all amounts related to the production of overhead including the operation and maintenance of the property, plant and equipment. On June 10th the purchaser paid \$100,000.00 and it was with this money that the business was operated during the interim period. During the interim period, however, all cheques had to be signed by Peat Marwick Limited.
- (p) June 11, 1982 was a Friday. On the Monday, June 14th, employees were called back to work to commence manufactur-



ing. Mr. Gary Rosenthal, the president of the purchaser, Stetson Hat Company, decided who should be called back and when. He also made all of the manufacturing decisions including the decision not to re-open a particular portion of the plant. From and after June 10, 1982, therefore, Stetson Hat Company effectively ran the business and made all operating and manufacturing decisions. As Mr. Harris put it, "they called the tune" with respect to starting up the business, what was to be produced and who was to be recalled.

- (q) The only people who had worked for Biltmore Hats who were not brought back by the Stetson Company were the supervisors and employees of the back shop, the portion of the business that was not being re-opened.
- (r) The conditional agreement for purchase and sale dated June 10, 1982 records the name of the purchaser as "Stetson Hat Company Inc.". The closing documents, however, record the name of the purchaser as "Biltmore/Stetson (Canada) Inc.". Mr. Harris testified that when the conditional agreement for purchase and sale was signed, Mr. Rosenthal had already decided to change the name. Mr. Harris stated that he wanted a name that would combine the names of both the Stetson Hat Company and the original company Biltmore Hats.
- (s) On or about June 10th, Mr. Rosenthal was considering the name "Biltmore-Stetson Hat Co. of Canada Inc." or something similar thereto as the combination name. Ultimately, however, "Biltmore/Stetson (Canada) Inc." was chosen. A company with this name was then formed as a wholly owned subsidiary of Stetson Hat Company. The officers of the two companies were identical. Mr. Harris described the difference between Stetson Hat Company and Biltmore/Stetson (Canada) Inc. as "a transparent difference".
- (t) According to Mr. Norman B. Irwin, the secretary-treasurer of Biltmore Hats until April 30, 1982 and the secretary-treasurer of the entity run by Stetson Hat Company as of June 10th, the new name, "Biltmore/Stetson (Canada) Inc." was registered on or about July 5th.

9. Mr. Sam Fox, the Canadian Director of the Amalgamated Clothing and Textile Workers Union, testified that as soon as he heard on June 7, 1982 that Stetson Hat Company was the likely purchaser of Biltmore Hats he called Mr. Gary Rosenthal, the president of the Stetson Hat Company, to ask for an appointment the next day. On June 8th, Mr. Fox, as Trustee of Local 82, and another person on the staff of the union met with Mr. Rosenthal and a representative of Peat Marwick. When Mr. Fox asked about the status of the company, he was told by Mr. Rosenthal that Stetson Hat Company was purchasing Biltmore Industries Limited and that "for all practical

purposes it [had already] been accomplished". Mr. Rosenthal explained that the sale was contingent on F.I.R.A. approval. Mr. Rosenthal further told him of his intention not to re-open the back portion of the plant and to recall employees within a week or ten days. When Mr. Fox asked what the name of the company would be Mr. Rosenthal said that he thought it would be "Biltmore-Stetson Hat Co. of Canada Limited". The next day Mr. Fox sent Mr. Rosenthal a notice to bargain dated June 9, 1982. It was addressed to the company under the above name which never in fact became the name of the company.

10. Counsel for the applicant argues that the notice to bargain given by the Hat Workers Union Local 82 on June 9, 1982 is ineffective for a number of reasons: Firstly, he argues that it was given prior to the actual sale of the business and was therefore premature. Counsel maintains that the sale took place on August 12th when the deal actually closed but argues that at the very earliest, the sale took place on either June 11th, the named effective date, or June 14th when the business started up again, but certainly not on June 9th, the date of the notice to bargain. He maintains that the notice to bargain anticipated by section 63(10) of the Act is a notice given to the successor employer subsequent to a sale having taken place and that unless it is given subsequent to the date of the sale it is ineffective to bar subsequent applications for certification. Secondly, counsel argues that the notice is ineffective because it was given to a corporation which never existed, that is, "Biltmore-Stetson Hat Co. of Canada Inc." He notes that at the time of the notice the entity involved was Stetson Hat Company, Inc. and that the subsequent, wholly owned subsidiary thereof was "Biltmore/Stetson (Canada) Inc." and not the entity to which Mr. Fox gave notice to bargain. Counsel for the applicant union describes the intervener's timeliness objection as "technical" and argues thereby that to be successful the intervener must fall squarely within the four corners of section 63(10), which he further describes as a technical provision of the Act.

11. Counsel for the applicant union commented that because the plant was shutdown as of March 8, 1982, there were no employees in the bargaining unit during the open period. He pointed out that as a result no application for certification by the applicant union could have been made until the employees were called back to work on or about June 14, 1982. Counsel complains that if the intervener succeeds in its argument that the application for certification is untimely then the employees will be deprived for one year of the ability to make a choice between the two competing unions. Counsel argues that because of the unique fact situation at hand, the employees' interest in choosing a bargaining agent out-weighs the ordinary concern for stability of bargaining rights following a sale of a business.

12. Counsel for the intervener views the matter differently. With respect to the timing of the sale of the business he argued that for the purposes of section 63 of the Act the sale took place even prior to the formal signing of the June 10th agreement. He notes that it was established by the testimony of Mr. Harris that prior to that date all aspects of the formal agreement had been agreed to and it was dated June 10th, 1982 simply because the lawyers had to catch up and put it in writing for signing. Counsel acknowledges that for certain legal purposes it would be accurate to state that the sale did not finally conclude until its closing in August. For labour relations purposes and the purposes of section 63 of the Act, however, he argued that the sale must be deemed

to have taken place, at the very latest, on June 10, 1982 when the conditional agreement was signed and the effective control of the business shifted to the purchaser. Counsel emphasized that from that point forward all of the operating and manufacturing decisions were made by the purchaser.

13. Focusing on his view of the proper balancing of interests between the parties, counsel for the intervener argued that the intent of section 63(10) of the *Labour Relations Act* is to give the incumbent union an opportunity to bargain with a new purchaser for a period of transition. Counsel noted that the Act repeatedly balances the right of employees to choose their bargaining representative with the need for stability of bargaining rights by defining very clear points of time at which representation issues can be aired. When a sale of a business takes place and notice to bargain has been given under section 63(3), the Act gives preference to the stability of collective bargaining over the airing of representational issues for a period of one year from the giving of notice. Counsel argues that in the instant situation the applicant seeks to override the clear balance that the Act has drawn by making a very technical objection to the timeliness of the notice to bargain which was dated one day before the formal conditional sale agreement was signed.

14. We turn to consider whether section 63(10) operates to bar the instant application for certification. In *Vaunclair Meats Limited*, [1981] OLRB Rep. Aug 1186 the Board held that an application for termination was untimely because prior to the filing of that application the union had given notice to bargain to the successor employer following the sale of a business. By the operation of section 63(10), the notice to bargain had created a one year bar to such applications. In the course of its decision the Board discussed the purpose of the section 63(10) bar as follows at pp. 1188-1189:

6. By the plain language of the Act, and specifically by making sections 49 and 53 [now sections 57 and 61] subject to the qualifications of section 55(10) [now section 63(10)], the Legislature has clearly opted to give precedence to preserving the stability of a union's bargaining rights where there has been a sale of a business. As the language of the Act reveals, the Legislature has adopted the view that special protection should extend to a union over the often unsettling period during which it seeks to establish a collective bargaining relationship with a new employer. In some cases the transition to a new management may be smooth and without incident as the successor employer willingly accepts to renew the framework, if not the precise terms, of the previous collective agreement. The transition, can, however, be jarring to a union, especially if the new employer, bent on changing the style and methods of a business, brings fundamental proposals for change to the bargaining table. Some of these proposals may be acceptable to a union and some may not.

7. Where a business has changed hands the possibility of greater stress on a union is real, it can no longer be sure that it will



bargain with the same expectations along the paths that it travelled time and again with the predecessor employer. In this sense a union bargaining with a successor employer after the transfer of a business is in a situation similar to a union bargaining a first collective agreement after certification. By enacting section 55(10) [now 63(10)] of the Act the Legislature has recognized that reality and has provided the union faced with a first negotiation with a successor employer the same protection of its bargaining rights as would operate to protect the negotiations of a first collective agreement. Like a newly certified union, a union dealing with a successor employer can proceed with the assurance that its bargaining rights cannot be subject to attack for a minimum of one year. That is the unequivocal effect of section 49(1) of the Act and it is the clearly intended consequence of section 55(10) of the Act.

8. The foregoing provisions represent a policy choice by the Legislature grounded in well established collective bargaining principles. In our view it would require clear and unequivocal language contrary to the existing language of the Act to support the argument of counsel for the intervener that section 55(10) was not intended to apply except in the case of the transfer of a business following certification. For the foregoing reasons the application must be dismissed.

15. The scheme of the Act, therefore, provides to the incumbent union a period of protection to enable it to develop a bargaining relationship with the successor employer, free from a challenge to its bargaining rights. The Board is satisfied that in the instant situation a sale of a business within the meaning of section 63 of the Act took place on June 10, 1982 when Stetson Hat Company took over the effective control of the business. Although Peat Marwick Limited still had to sign cheques and was responsible for certain financial matters, the evidence establishes that Stetson Hat Company was financing the operation of the business by paying the employees' wages, purchasing inventory and supplies, paying for utility charges and the maintenance of the property. As well, Stetson Hat Company was making all managerial decisions relating to the operation of the business. It decided when to open the business, what portion of the business to open and how and when to call back employees.

16. We conclude that the effective date of the sale of the business for the purposes of section 63 of the Act was June 10, 1982. The intervener or incumbent union gave the successor employer a notice to bargain dated June 9th. Is the notice ineffective simply because it is dated one date prior to the signing of the purchase and sale document?

17. In *Otto's Deli*, [1980] OLRB Rep. Nov. 1673 the Board considered in the context of a termination application the effectiveness of an "early" notice to bargain. The union in that case argued that its notice to bargain had not been effective to terminate the collective agreement because it was given some two weeks prior to the open period that was specifically designated in the collective agreement. In declining to

accept the union's argument, the Board stated that the early notice could be cured by the "simple passage of time". At p. 1675 the Board said,

As a matter of interpretation we find it difficult to accept that an early notice to bargain is insufficient to terminate the agreement on its nominal expiry date. The purpose of notice provisions is to ensure that both parties have an adequate opportunity to prepare their bargaining positions prior to the expiry of the agreement, and surely the parties could not have intended that an early notice would be ineffective, and that the agreement would therefore continue for a further year. We do not propose to review the numerous cases which distinguish between "mandatory" and "directory" provisions of a collective agreement, (but see generally: Brown and Beatty, *Canadian Labour Arbitration*, Canada Law Book, 1977 pp. 78-84); it suffices to say that we do not think that the parties intended the continuation provisions to operate despite a notice which was not only adequate but, in fact, more generous than that required by the agreement. *Moreover, we see no reason for concluding that this early notice was a nullity, and could not be cured by the simple passage of time. There is no evidence that it was rejected or withdrawn, and we do not see why it cannot take effect on March 31, 1980 – the first day for giving notice prescribed by the collective agreement.*

[emphasis added]

18. In the instant matter the intervener's notice to bargain was only one day early, at most, rather than more than two weeks early as was the case in *Otto's Deli*. Moreover, similar to the situation in *Otto's Deli*, there is no evidence in the instant matter that the notice was rejected by the employer or withdrawn by the union prior to the date in question, in this case, June 10, 1982. Consistent with its decision in *Otto's Deli*, the Board is satisfied that the earliness of the instant notice to bargain can be cured by the passage of time. We conclude in other words, that it was still "speaking" a day later on June 10th when the sale of the business took place. While it may be that the notice dated June 9th could not have barred an application for certification filed on June 9th, the day prior to the sale, it became effective notice for the purposes of section 63(10) once the sale actually took place a day later on June 10th. As of that date it raised a one year bar to any application for certification.

19. Counsel for the applicant union further argued that the notice to bargain should be considered ineffective as it was addressed to a company that did not in fact exist. The Board cannot agree. The union spoke to the undisputed president of the successor company, Mr. Rosenthal, and addressed its notice to Mr. Rosenthal's attention under the company as described by him. The union acted on the best information available at the time it sent its notice. There is no suggestion that Mr. Rosenthal did not receive the notice or did not understand that it was for his successor employer company whatever its actual name. In these circumstances the Board concludes that the notice was not adversely affected by the slight misnaming of the successor employer or by the fact that that wholly owned subsidiary was not formally registered until a few weeks later.

20. The Board finds, therefore, that the intervener trade union gave the successor employer effective notice to bargain pursuant to section 63(3) of the Act. By the combined terms of sections 63(10) and 5(2) of the Act, therefore, no application for certification can be made for one year following the notice to bargain.

21. The application for certification, therefore, is untimely and hereby dismissed.

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**1805-82-R** United Brotherhood of Carpenters & Joiners of America, Local 18, Applicant, v. **Beatty-Hall Construction Co. Limited**, Respondent

**Certification – Construction Industry – Membership Evidence – Practice and Procedure – Official Form 80 declaration re membership prescribed by regulation not filed – Document filed drawn up by applicant not containing declaration paragraph – Board not accepting membership evidence filed**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

**DECISION OF THE BOARD; January 19, 1983**

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

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3. In support of the application the applicant filed membership evidence with respect to four individuals. The membership evidence consists of combination applications for membership and receipts indicating the payment of one dollar on account of initiation fees or monthly dues. The applicant also filed a document which is headed up "Form 80, Declaration Concerning Membership Documents Construction Industry". The document is not in fact the Form 80 prescribed by the regulations but rather appears to have been drawn up in the applicant's office. Although the document is similar in many respects to the prescribed Form 80, it does not contain paragraph 3 of the required form, which is the paragraph by which a union officer declares that on the basis of his personal knowledge and inquiries, the persons whose names appear on receipts for the payment of dues or initiation fees are the persons who actually collected the money indicated, and that each person on whose behalf a receipt was submitted personally paid the money.

4. In certification proceedings such as this, the Board must rely on documentary membership evidence which is not revealed to the employer or subjected to cross-examination. Because of this, the Board requires assurances from a responsible union official concerning the authenticity of the membership documents. Lacking such assurances in the form of a proper Form 80 (or Form 9 outside of the construction



industry) the Board's invariable practice is to refuse to give any weight to the membership evidence filed. See, *Pietrangelo Masonry*, [1981] OLRB Rep. Feb. 218.

5. In the instant case, the applicant has failed to file a Form 80 containing the type of assurances referred to above. This being the case, we are of the view that the applicant has not filed any acceptable evidence of membership. The application is accordingly dismissed.

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**1100-82-OH** International Association of Machinists and Aerospace Workers, Lodge No. 771, Complainant, v. **Boise Cascade Canada Ltd.**, Respondent

**Health and Safety – Grievor refusing to shut down machine suspended – No safety concern raised at time – Board finding discipline for insubordination – No violation of Act**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members B. Lee and I. Stamp.

**APPEARANCES:** *W. Dubinsky and Robert Pollard for the complainant; R. C. Fillion and W. Murray for the respondent.*

**DECISION OF THE BOARD;** January 20, 1983

1. The complainant has complained that the grievor, Keith McKinnon, has been dealt with by the respondent contrary to the provisions of section 24 of the *Occupational Health and Safety Act*. The complainant has requested that a three-day suspension of the grievor be rescinded and that he receive his full retroactive pay and benefits. The respondent denied the allegations of the complainant and specifically denied that it has breached any provision of the *Occupational Health and Safety Act*.

2. The respondent operates a pulp and paper mill in Fort Frances and the complainant is the collective bargaining agent for certain employees (including the grievor) of the respondent at Fort Frances. There are three paper machines within the respondent's facilities. These machines require regular maintenance approximately every three to four weeks. Such maintenance is usually performed on Thursdays. On Thursday, June 24, 1982, paper machine number six (the "machine") was scheduled for maintenance. This required the machine to be shut down from 8:00 a.m. to 4:00 p.m. and this in turn required an employee of the respondent to come in to work at 7:00 a.m. and shut down the machine. The shutdown is regularly performed by a pipefitter who is in the bargaining unit represented by the complainant.

3. During the week of Monday, June 21, 1982, Paul Ewacha, the supervisor in the respondent's machine shop, was relieving Brian Wayland, the maintenance supervisor on the paper machines, who was on holidays. Between 2:00 and 3:00 p.m. on

Tuesday, June 22, 1982, Ewacha commenced to inquire whether any of the pipefitters would be interested in reporting for work at 7:00 a.m. on Thursday, June 24, 1982, in order to shut down the machine so that maintenance work could be performed on it. The shutdown by a pipefitter takes about an hour.

4. Initially, Ewacha asked Angelo D'Attaro, the most senior and the most experienced pipefitter. D'Attaro asked if he would receive a four-hour call in and a meal ticket. Ewacha informed him that he would not receive either of these items but would instead receive one and a half hours' pay for one hour of work. It should be explained that a meal ticket is a voucher worth four dollars and twenty-five cents and which may be redeemed in Fort Frances for a meal or other services. Ewacha then asked other pipefitters whether they would come in and shut down the machine at 7:00 a.m. on Thursday, June 24, 1982. Ray Degagne, Doug Brown, Lynn Cain and the grievor, Keith McKinnon, each indicated that they would not come in and perform the shutdown on the machine. Ewacha then proceeded to put the same question to pipefitters in other crews. He asked Vic Alberts who asked him if he would get a four-hour call in and was informed he would get one and a half hours' pay for one hour of work. Alberts indicated he would not come in under these conditions. Ewacha then asked Terry Robinson who refused to come in. He then asked Alvin Wekner, who replied that he had never previously shut down the machine and did not know how to do the job. After receiving these replies, Ewacha did not ask anyone else.

5. During the evening of Tuesday, June 22, 1982, Ewacha told Cliff Hall, the maintenance superintendent and his immediate supervisor, that he had been unable to obtain anyone to perform the shutdown. Hall informed Ewacha that he would have to ask the grievor on Wednesday, June 23, 1982, because he was the junior man on Wayland's crew, to come in at 7:00 a.m. on Thursday, June 24, 1982, and shut down the machine. In accordance with these instructions, Ewacha spoke to the grievor on Wednesday, June 23, 1982, between 9:00 and 10:00 a.m. and told him that as the junior man he would have to come in and shut down the machine on Thursday, June 24, 1982. The grievor replied that he would not come in. Ewacha pondered the reply for a while and then repeated the request to the grievor and informed him that there could be a reprimand if he did not come in. The grievor again refused to come in as requested and asked when Ewacha came in to work. Ewacha replied that he came in to work at 7:00 a.m. and that ended the conversation. Ewacha testified that the grievor during these conversations never said anything about being unable to shut down the machine.

6. On Thursday, June 24, 1982, Ewacha was on the respondent's premises at about 7:00 a.m. He changed his clothes and at about 7:10 a.m. he saw the grievor at the location where the pipefitters congregate and drink coffee. Ewacha approached the grievor and asked him if he had shut down the machine. The grievor replied that he had not shut down the machine because he did not know how to do it. Ewacha then sought Hall and told him what had transpired with the grievor. Both of the men went over to the grievor to speak to him. It was about 7:20 a.m. and the grievor was sitting on a bench at the same location. Hall asked the grievor if he showed him the location of the valves would he shut off the valves. The grievor replied that he would not go with Hall because Hall was not qualified to shut off the valves. At this point Ewacha left the two men because he was required at a meeting at 7:30 a.m.

7. On Tuesday, June 22, 1982, Hall had previously been consulted by D'Attaro about the remuneration for coming in early and shutting down the machine. He confirmed that D'Attaro would neither receive a meal ticket nor a "call in". Hall testified that D'Attaro then said he would not come in to shut down the machine and would tell all the other pipefitters not to come in. Hall gave evidence that on the morning of Wednesday, June 23, 1982, he was approached by the grievor and Robin Bowes, the complainant's representative on the occupational health and safety committee and job steward, and confirmed to the grievor that he would not receive a "call-in" if he shut down the machine. Upon being informed that he would receive one and a half hours' pay for one hour of work, and would not receive a meal ticket, the grievor then for the first time adopted a different position and said that he was not trained to do the job and could not shut down the machine. Hall informed the Board that he had been told by Wayland that the grievor had previously spent time with the pipefitters learning how to shut down the machine. As stated earlier, Hall offered to show the grievor how to shut down the machine and he told the grievor that the grievor knew how to shut down the machine. Hall testified that he told the grievor that if the grievor was unsure of how to shut down the machine he would show him how to do it. The grievor again refused to shut down the machine. At this point Hall left for his regular 7:30 a.m. meeting. On this occasion the meeting lasted only five minutes because there were no problems in maintenance and production. Hall returned to the place where the grievor was sitting and again offered to show him how to shut down the machine. Again the grievor refused Hall's offer and again stated that Hall did not know how to do it. At this point Hall informed the grievor that if he was refusing to go to work he had no choice but to send him home. Once again Hall offered to show him how to shut down the machine. Once again the grievor refused the offer. The grievor then thanked Hall and left to go home. Subsequently, the grievor was notified that he was suspended for three days.

8. The Board heard additional evidence from Wayland, D'Attaro and from the grievor. The evidence from D'Attaro indicated that he performed most of the shutdowns on all of the respondent's paper machines and that the respondent had recently changed its method of remuneration for these tasks. This did not find favour with D'Attaro as the most experienced pipefitter and it reduced his payments for performing the shutdowns. There was a conflict in the evidence among these three witnesses concerning whether the grievor had received instruction in how to shut down the machine since it had been remodelled in February of 1982. The evidence of Wayland was persuasive and supported by records from his daily reports. In addition, Wayland did not waiver under cross-examination. On the other hand, D'Attaro, while most forthcoming as a witness, was vague on the issue of the training which the grievor had received. The grievor, in his testimony, was a most unconvincing witness and changed his evidence in cross-examination. We do not believe the grievor when he gave evidence that he had not received instructions on the shutdown of the machine after February of 1982. We find that the grievor received such instruction in June of 1982. In addition, we do not believe the evidence of the grievor that he raised issues of safety concerning the shutdown of the machine before any of the respondent's supervisory staff at any time up to and including the time of his final refusal to shut down the machine on June 24, 1982, and his subsequent suspension for three days.

9. The complainant has characterized this complaint under section 89 of the *Labour Relations Act* as conduct contrary to section 24 of the *Occupational Health and*



*Safety Act* in that the respondent refused to abide by the provisions of section 23(6) of the *Occupational Health and Safety Act*. By virtue of the provisions of section 24(5) of that statute, the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection 1 lies upon the employer or the person acting on behalf of the employer. Sections 24(1) and 23(6) of the *Occupational Health and Safety Act* provide:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

23.-(6) Where, following the investigation or any steps taken to deal with the circumstances that cause the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

10. The respondent has satisfied the Board that it did not act contrary to the provisions of sections 24(1) and 23(6) when it administered a three-day suspension to Keith McKinnon, the grievor, on or about June 24, 1982. There was no evidence before



the Board of an investigation pursuant to section 23(6) of the *Occupational Health and Safety Act* and the Board finds, on the basis of the evidence before it, that Mr. McKinnon was disciplined for insubordination when no issue of safety was being raised by either Mr. McKinnon or the complainant.

11. It appears that there lies behind this complaint an issue over the value to be placed on the task of shutting down paper machines. There was mention by counsel of a pending arbitration on this issue. The Board expresses no opinion on the merits of such an issue and does not minimize the caution required in handling steam and condensate. The matter of the interpretation of the collective agreement between the parties is a matter for a board of arbitration and not this Board.

12. This complaint is dismissed.

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**0417-82-U; 0773-82-U Food and Service Workers of Canada, Complainant, v. Bond Place Hotel, Respondent**

**Damages – Practice and Procedure – Burden on respondent to show absence of mitigation of damages – Employee discharged from part-time position looking for full-time job – Reasonable in circumstances – Quitting of part-time work before finding full-time work held unreasonable**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. Wilson and B. L. Armstrong.

**APPEARANCES:** Mary Cornish for the complainant; M. Contini for the respondent.

**DECISION OF THE BOARD, January 18, 1983**

1. These are two complaints under section 89 of the *Labour Relations Act* which allege that Mr. Richard Dowdell and Miss Colette Granger were discharged contrary to the provisions of the Act.

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3. The respondent has acknowledged that it did unlawfully terminate both Miss Granger and Mr. Dowdell. The parties are in disagreement as to whether or not Miss Granger and Mr. Dowdell adequately mitigated their losses flowing from their unlawful terminations.

4. A grievor in a section 89 complaint who has been improperly terminated has a duty to take reasonable steps to mitigate his or her loss by seeking alternate employment. A grievor who makes no real effort to obtain alternate employment or otherwise mitigate will not be entitled to any compensation for loss of wages. See, the *Sutton Place Hotel* case ([1980] OLRB Rep. Aug. 1250. However, the burden of proof that a grievor failed to take reasonable steps to mitigate falls upon the respondent.

Further, as the Board noted in the *P. J. Wallbank Mfg. Company Ltd.* case [1980] OLRB Rep. Dec. 1797, because the situation is one where the party who has breached the Act and acted wrongfully toward the employee is demanding some action from the innocent injured party, the onus on a respondent is not a light one. In our view, as long as the evidence indicates that a grievor has acted reasonably in seeking to obtain alternative employment after being unlawfully terminated, no deduction should be made from the amount of compensation payable.

5. Miss Granger worked for the respondent on weekends. She also worked at two other part-time jobs. Prior to her discharge by the respondent Miss Granger had started to seek full time employment to replace her three part-time jobs. Subsequent to her discharge, she actively continued to search for full-time employment. Miss Granger did make some efforts to find additional regular part-time employment, but such efforts were clearly secondary to her attempts to find full time employment. Miss Granger did obtain some "casual" weekend work.

6. We are satisfied that Miss Granger reasonably sought to mitigate her losses. In this regard we view her attempts to find full time employment as reasonable conduct. Accordingly, the respondent is liable for all of Miss Grangers' losses resulting from her unlawful discharge, less only a sum equivalent to what she actually earned while working at casual weekend work.

7. Mr. Dowdell worked for the respondent as a full-time short-order cook. Shortly after his discharge he registered with Canada Manpower. He also spent much time and effort looking for other employment. The respondent contends that Mr. Dowdell should have used the services of a hospitality placement agency rather than rely simply on his own efforts. In our view, Mr. Dowdell's efforts to find employment were reasonable, and his failure to utilize a placement agency does not detract from this fact.

8. In approximately mid-June of 1982 Mr. Dowdell received an offer of employment at a restaurant in Welland. Mr. Dowdell's parents reside in Welland, although at the time he himself was living in Toronto. Mr. Dowdell was advised by the restaurant that he would start working on a part-time basis, but that his position would shortly become full-time. Prior to Mr. Dowdell commencing the job in Welland, he received an offer of full-time employment from a restaurant in Toronto. Mr. Dowdell turned down this Toronto offer primarily because he had run out of money and felt that he would be better off working in Welland where he could reside with his parents. Unfortunately, the Welland job never did turn into a full-time position. Indeed, apparently because of poor business, the restaurant advised Mr. Dowdell that his hours were to be cut back. Mr. Dowdell at this point resigned from the job to look for other employment. We gather that his decision to resign immediately rather than continue working part-time while he looked for other employment, was motivated only by a desire to receive maximum unemployment insurance benefits.

9. In our view, in that Mr. Dowdell understood that the position in Welland would shortly become full-time, it cannot be said that he acted unreasonably in turning down the Toronto job. This is particularly so in light of the fact that he had run out of money subsequent to his unlawful termination by the respondent, and in Welland he

could reside with his parents. However, in our view his action in quitting the job prior to having obtained alternate full-time employment was, in the circumstances, not a reasonable attempt to mitigate his losses. Accordingly, we are satisfied that there should be deducted from the compensation payable to Mr. Dowdell an amount equal to what he earned at the job in Welland as well as an amount equivalent to what he would have earned had he not terminated his employment.

10. The Board will remain seized of these matters in the event that the parties cannot reach agreement on the actual amount of compensation owing to Mr. Dowdell and Miss Granger.

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**1559-82-R; 1651-82-R** Service Employees Union, Local 204 affiliated with S.E.I.U., A.F. of L., C.I.O., Applicant, v. **Broadway Manor Nursing Home**, Respondent, v. Christian Labour Association of Canada, Intervener; Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC., Applicant, v. Fiddick's Nursing Home Limited, Respondent, v. Christian Labour Association of Canada, Intervener

Certification – Constitutional Law – Timeliness – Whether *Bill 79* extending collective agreements beyond normal expiry dates – Whether having effect of suspending open-periods – Whether rendering displacement applications untimely – Whether *Bill 79* contrary to *Charter of Rights*

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members I. M. Stamp and B. L. Armstrong.

**APPEARANCES:** *J. Sack, Q.C., Ethan Poskanzer and Ron Davidson for the applicant Service Employees Union, Local 204; J. Sack, Q.C., Ethan Poskanzer and Jack Nichols for Service Employees Union, Local 210; R. Gordon Spear and Robert Howell for the respondent Broadway Manor Nursing Home; Maxine Fiddick and Sam Mandelbaum for the respondent Fiddick's Nursing Home Limited; Owen V. Gray and Hank Beekhuis for the intervener in Board File 1559-82-R; Owen V. Gray and Ed Grootenboer for the intervener in Board File 1651-82-R.*

**DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER I. M. STAMP; January 31, 1982**

1. The Board directs that the above applications be and the same are hereby consolidated.

2. These are pre-hearing displacement applications for certification which were filed on November 16 and 24, 1982. The applications are two locals of the same International Union and the intervener is the incumbent union in both cases. The incumbent trade union takes the position that both applications are untimely under the



*Labour Relations Act*, R.S.O. 1980, c. 228 by virtue of the operation of the *Inflation Restraint Act*, S.O. 1982, c. 55 (*Bill 179*) which was passed into law on December 15, 1982. Pre-hearing votes have been conducted in both units. However, the ballot boxes have been sealed pending a determination by the Board in this matter.

3. The Board heard evidence at the outset which satisfies it that both the respondent organizations are nursing homes operating under the authority of a licence issued under the *Nursing Homes Act*, R.S.O. 1980, c. 320. Furthermore, the evidence establishes that at the time of this application each of the respondent employers was party to a collective agreement with the intervener trade union. Under its terms the collective agreement between the intervener and the respondent Broadway is to run for a term extending from January 1, 1981 to December 31, 1982. Under its terms the collective agreement between the intervener and the respondent Fiddicks is to run for a term extending from November 1, 1980 to December 31, 1982. The Board made these findings of fact orally at the hearing.

4. The relevant provisions of *Bill 179* are:

36. This Act shall be deemed to have come into force on the 21st day of September, 1982.

4. In this Part, ...

(c) "collective agreement" means a collective agreement as defined in the *Labour Relations Act*, an agreement referred to in subsection 5(1) of the *Fire Departments Act* or subsection 29(2) of the *Police Act*, a decision resulting from arbitration that, by operation of law or agreement, governs working conditions or terms of compensation, and any agreement between a unit of employees established for collective bargaining and an employer or person in the position of an employer for defining, determining or providing for working conditions or terms of compensation;

(d) "compensation" means all forms of payment, benefits and perquisites paid or provided, directly or indirectly, to or for the benefit of a person who performs duties and functions that entitle that person to be paid a fixed or ascertainable amount;

(e) "compensation plan" means the provisions, however established, for the determination and administration of compensation, and includes such provisions contained in collective agreements or established bilaterally between an administrator and an employee, unilaterally by an administrator or by or pursuant to any Act of the Legislature;

6. (1) This Part applies to the compensation plans of employees employed in or by,



- (a) any authority, board, commission, corporation, office, person or organization of persons, or any class of authorities, boards, commissions, corporations, offices, persons or organizations of persons, set out in the Schedule hereto or added to the Schedule by the regulations.

11. Every compensation plan that is in effect on the 21st day of September, 1982, to which this Part applies and that expires on or after the 1st day of October, 1982, including every compensation plan extended under section 9, shall,

- (a) Where the expiry date is scheduled to occur on or after the 1st day of October, 1982 and prior to the 1st day of October, 1983, be extended for the twelve-month period immediately following the scheduled expiry date;

13. Notwithstanding any other Act except the *Human Rights Code, 1981* and section 33 of the *Employment Standards Act*, but subject to section 14, the terms and conditions of,

- (a) every compensation plan that is extended or made subject to this Part under section 9 or 11 and
- (b) every collective agreement that includes such a compensation plan,

shall, subject to this Part, continue in force without change for the period for which the compensation plan is extended or made subject to this Part.

14. (1) Where the parties to a collective agreement,

- (a) cannot agree on the amount of the increase in compensation rates to which members of the compensation plan included in the collective agreement are entitled under clause 19(a) or subclause 10 (b) (ii);
- (b) cannot agree on the value to be placed on a proposed change to any terms and conditions of the compensation plan equivalent to an increase in compensation rates, but are agreed on all other aspects of the proposed change; or
- (c) have agreed on all aspects of a proposed change to the terms and conditions of the compensation plan equivalent to an increase in compensation rates, including the value thereof,

either party may apply to the Board in accordance with such procedure as the Board specifies to have the disputed matters

resolved or, in the case of a proposed change referred to in clause (c), to have the proposed change reviewed by the Board, and the Board shall, in accordance with this Act and in its discretion, determine, as the case requires, the amount of the increase in compensation rates to which the members of the compensation plan are entitled or the value to be placed on a proposed change referred to in clause (b) or (c), provided that,

- (d) for the period referred to in clause 10(a) or subclause 10(b) (ii), such increase, or the value of such proposed change, does not constitute an increase that is, or that is equivalent to, more than the increase referred to in those provisions; and
- (e) for the period referred to in subsection 12 (1), the value of such proposed change does not constitute an increase that is equivalent to more than the increase permitted under section 12.

(2) Where the administrator of a compensation plan that is not included in a collective agreement proposes to change any terms and conditions of the plan, and the change, if made, would be equivalent to an increase in compensation rates under the plan, the administrator shall, before the proposed change may be implemented, apply to the Board in accordance with such procedure as the Board specifies to have the proposed change reviewed, and the Board may, in accordance with this Part and in its discretion, determine the value to be placed on the proposed change and approve, reject or vary the terms thereof as it sees fit, provided that, for the period for which the proposed change (as approved or varied by the Board) is to be effective, the value thereof, together with any other increases in the period in accordance with this Part, does not constitute an increase equivalent to more than an increase authorized by this Part for the period, and the proposed change, as approved or varied by the Board, may be implemented.

(3) The failure of the administrator of a compensation plan to exercise, or to exercise fully, the discretion conferred on him by subsection 12(2) and in accordance with subsection 12(3) is, on the application of the Board of a party affected thereby, reviewable by the Board, and the Board may, in accordance with those subsections, make any decision that the administrator could or should have made, and its decision shall be implemented by the administrator.

15. The parties to a collective agreement that includes a compensation plan that is extended under section 11 may, by agreement, amend any terms and conditions of the collective agreement other than compensation rates or other terms and conditions of the compensation plan.

## SCHEDULE

### *Ministry of Health*

1. Any authority, board, commission, corporation, office, person or organization of persons which operates or provides:

(b) A nursing home, under the authority of a licence issued under the *Nursing Homes Act*, R.S.O. 1980. c, 320;

5. The relevant sections of the *Labour Relations Act* are:

5. (4) Where a collective agreement is for a term of not more than three years, a trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last two months of its operation.

16. (1) Where notice has been given, under section 14 or 53, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

53. (1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

72. (1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this act and,

(a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 113(3) to have released to the parties the report of a conciliation board or mediator; or

(b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 113(3) to have released to the parties a notice that he does not consider it advisable to appoint a conciliation board.

The applicant unions also made reference to section 79(1) of the Act which reads:

79. (1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

6. In light of the findings of fact which were made at the hearing, it is not disputed between the parties that *Bill 179* was in full force and effect at the time of the instant applications and that it applies to the respondent employers by virtue of Section 1(a) under the heading Ministry of Health, of the Schedule appended to the Bill.

### *SUBMISSIONS*

7. The intervener trade union argues that under section 11(a) of *Bill 179*, the compensation plans covering the employees of both respondents are extended for a period of 12 months past the expiry dates set out in the respective collective agreements. This being the case, the intervener trade union reads section 13 of *Bill 179* as continuing the respective collective agreements, which contain the compensation plans which are extended under section 11, in full force without change for the period for which the compensation plan is extended. The intervener maintains that because section 13 of *Bill 179*, is made to operate "notwithstanding any other Act" it overrides the *Labour Relations Act* and specifically those sections dealing with the term of operation of collective agreements and the timeliness of representation applications. The intervener takes the position that the legislature did not have to specify in section 13 of *Bill 179* that collective agreements would continue in force for the same period as the compensation plan is extended in order to effectuate the overriding purpose of *Bill*



179. It argues that extension of the compensation plan in and of itself serves to restrain wages and benefits. However, having expressly extended the collective agreements which contain compensation plans which are extended, the intervener argues that this Board must give effect to section 13 of *Bill 179* and find that the collective agreements before it are extended for a 12-month period thereby making these applications untimely under section 5 of the *Labour Relations Act*.

8. The intervener argues that the result of the interpretation of section 13 of *Bill 179* which it is proposing, and its effect upon the operations of the *Labour Relations Act*, is both sensible and reasonable. The intervener argues that if the collective agreements are not extended in full force under section 13 of *Bill 179*, the result will be to maintain the open period which would exist in the absence of *Bill 179*. If this is the case, the duty to bargain following notice under sections 14 or 53 of the Act and the option of requiring the appointment of a conciliation officer under section 16 would be triggered and, in turn, the timeliness requirements for a legal strike or lockout could be satisfied. The intervener argues that it makes eminently good sense for the legislature to have eliminated the open period, and with it the possibility of strikes and lockouts, at a time when wages and all types of benefits are restrained and regulated by statute. Furthermore, where the *Labour Relations Act* contemplates that the collective bargaining process will ultimately result in a collective agreement, but where it is equally clear on a reading of *Bill 179* that it is not contemplated that new collective agreements will be entered into during the period of restraint, the intervener argues that the legislature must have intended to close off the open period in order to preserve existing collective agreements. Finally, the intervener argues that if the incumbent bargaining agent is to be hamstrung in what it can accomplish at the bargaining table by the operation of *Bill 179*, it is not unreasonable to close off the open period in order to prevent the type of disruptive applications which are before the Board in this case.

9. Neither of the respondent employers took a position with respect to the timeliness of these applications.

10. The applicant trade unions take the position that, wherever possible, a statute ought to be construed so as to avoid consequences which are contrary to public policy. The applicants maintain that where the legislature has provided a statutory scheme which allows for employee displacement of a bargaining agent, as it has under the *Labour Relations Act*, the Board, if at all possible, ought to interpret *Bill 179* in such a way as not to interfere with this fundamental right provided under the *Labour Relations Act*. Where, as in this case, the primary purpose of *Bill 179* is to restrain compensation and there is no reference to its effect upon displacement applications for certification under the *Labour Relations Act*, the applicants maintain that every effort should be made to interpret *Bill 179* in a manner which does not interfere with the rights of employees under the *Labour Relations Act*.

11. The applicants maintain that there is a fundamental flaw in the literal interpretation of section 13 of *Bill 179* advanced by the intervener. The applicants do not read section 13 of *Bill 179* as continuing in force every collective agreement containing a compensation plan which is extended by operation of the Bill, but rather, as continuing in force "the terms and conditions" of such agreements. The applicants, citing *Re Telegram Publishing Co. and Zwelling et al*, (1975) 67 D.L.R. (3d) 404 and

relying on the Board jurisprudence under section 79 of the *Labour Relations Act*, argue that there is a fundamental distinction between the terms and conditions established under a collective agreement and the collective agreement itself. The applicant observes that although section 79 of the *Labour Relations Act* preserves terms and conditions of employment, it has never been suggested that it somehow interferes with the right of employees to switch bargaining agents at the times stipulated in the *Labour Relations Act*. The applicants maintain that the intervener has ignored the words “terms and conditions” in section 13 of *Bill 79*, and argue that when these words are given their normal meaning in the context in which they are used they fundamentally alter the meaning of the section. The applicants urge the Board to draw the necessary distinction between the extension of the terms and conditions of a collective agreement and the extension of the collective agreement itself and find that section 13 of *Bill 179* does not interfere with the right of employees to change bargaining agents under the *Labour Relations Act*.

12. In response to the intervener’s submission that because the primary purpose of *Bill 179* is addressed with the extension of compensation plans under section 13(a) of the Act, the inclusion of section 13(b), which refers specifically to collective agreement and overriding the displacement and other open period provisions contained in the *Labour Relations Act*, the applicants argue that section 13(b) was included in *Bill 179* for an altogether different purpose. It is the applicant’s contention that section 13(b) was incorporated so as to prevent a trade union from relying on *Cyprus Anvil*, [1976] 2 Can. L.R.B.R. 360 and *Libby McNeil* [1977] OLRB Rep. Apr. 204; application for judicial review, reversing Bd. (1978) 21 O.R. (2d) 340 (Div. Ct.) rev’d on appeal 21 O.R. (2d) 362 (C.A.) (these cases deal with the effect of the federal government’s 1976 anti-inflation programme on the operation of collective agreements) to argue that a collective agreement has been frustrated by the operation of section 13(a) of *Bill 179* thereby allowing it to renegotiate in light of the new statutory framework.

13. Without accepting that *Bill 179* interferes with the right to strike under the *Labour Relations Act* the applicants maintain that employees may wish to displace an incumbent trade union for reasons unrelated to its ability to bargain. In any event, it is the position of the applicant that the same restrictions upon the ability to bargain for improved terms and conditions of employment apply to it as apply to the intervener. In these circumstances, the applicants question the intervener’s contention that the legislature would not have wanted to hamstring an incumbent union on the one hand and to have allowed displacement applications to be processed on the other. The applicants maintain, therefore, that even if *Bill 179* can be read as abridging the right to strike the result is not to demonstrate a legislative intention to bar displacement applications as provided under the *Labour Relations Act*.

14. While conceding that we do not have to decide the issue in this case, the applicants, citing *Re Bradburn et al* and *Wentworth Arms Hotel et al*, [1978] 94 D.L.R. (3d) 161 and *I.B.E.W. Local 1432 v Town of Summerside* [1960] S.C.R. 591 maintain that so fundamental a right as the right to strike, as provided under the *Labour Relations Act*, ought not to be interfered with by the operation of another statute unless no other result can be arrived at. In the absence of express language abridging the right to strike, in the face of its interpretation of section 13 of *Bill 179*, and in the face of section 15 of *Bill 179*, which contemplates some negotiation between the parties to a

collective agreement, the applicants suggest that the only impact of *Bill 179* on bargaining carried on under the *Labour Relations Act* is to bring into play the Board's remedial power to deal with breaches of the duty to bargain in good faith where a party attempts to strike or lockout in an effort to exceed the compensation restrictions imposed under *Bill 179*.

15. Citing excerpts from Maxwell on *The Interpretation of Statutes*, 12th edition, (1976) N.M. Tripathi Private Ltd., *The Construction of Statutes*, E.A. Driedger, Butterworths, and *Craies on Statute Law*, 7th edition, S. G. Gredgar, London, Sweet and Maxwell, (1971), the applicants ask the Board to apply a number of rules of construction which, it maintains, will cause the Board to harmonize the two statutes in the manner suggested by it. The applicants argue that it is a rule of statutory construction that nothing is redundant and that every word must be given a meaning so that the words "terms and conditions" cannot be read out of section 13 of *Bill 179* as the intervener has attempted to do. The applicants argue that statutory language is to be read consistent with other statutes in the same field so that the words "terms and conditions" should be given the same meaning in both the *Labour Relations Act* and *Bill 179*. The applicants argue that a statute must be read purposively so that *Bill 179*, whose purpose it is to restrain compensation, should not be read as interfering with the rights of employees to organize under the *Labour Relations Act*. The applicants maintain that, where statutes are not clear, a presumption exists that one does not override another unless the result would be an absolute repugnancy, a further presumption exists against interfering with vested rights and finally a presumption exists against construing a statute in such a way that it interferes with international obligations. The applicants argue that the interpretation of (Bill 179 urged by the intervener conflicts with the United Nations treaties on Human Rights and the International Labour Organization Convention on Freedom of Association, both of which guarantee freedom of association and both of which are signed by this country.

16. Finally, the applicants rely on the *Charter of Rights*. The applicants argue that the Charter is the supreme law of the land and, therefore, insofar as *Bill 179* abrogates the freedom of association provided in Section 2(d) of the Charter, it is null and void. The applicants take the position that where the interference with freedom of association which the intervener maintains is worked by *Bill 179* is not expressly contemplated within the statute, so that the interference can reasonably be termed an incidental effect, it can hardly be said that the interference falls within the provision of section 1 of the Charter which makes the rights enshrined in the Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

17. The intervener argues in reply that the legislature recognized that section 13 would conflict with other statutes including the *Labour Relations Act*, and, therefore, it prefaced the section with the words "notwithstanding any other Act". Accordingly, the intervener maintains that on the clear direction of the legislature, whatever conflict arises is to be resolved by following *Bill 179*. In response to the applicants' position that the words "terms and conditions" as a preface to section 13(b) of *Bill 179* are designed to prevent a trade union from claiming that its collective agreement has been frustrated, the intervener argues that it is more reasonable to conclude instead that the legislature wanted to pin down the extension of each and every term, not just the



monetary terms encompassed by the compensation plan. The intervener argues as well that if the legislature intended to extend only terms and conditions but not the collective agreement, it could have simply said that terms and conditions are extended but not the collective agreement. In any event, the intervener argues that the position advanced between the extension of a collective agreement and the terms and conditions of a collective agreement is self-defeating. The intervener maintains that if the terms and conditions of the collective agreement are extended, as argued by the applicants, the recognition clause under which the intervener is the recognized bargaining agent and the no strike and no lockout clause continue in force. Furthermore, the intervener argues that, on the language of section 15 of *Bill 179*, it is contemplated that if any changes are made to terms and conditions other than those contained in the compensation plan, they will be made on agreement of the parties to the collective agreement in existence at the time *Bill 179* came into force and not by a successor trade union.

18. In response to the position of the applicants that section 13 of *Bill 179* is worded as it is for the purpose of preventing a trade union from claiming that its existing collective agreement has been frustrated and that it should be allowed to renegotiate, the intervener argues that if this is the purpose, the legislature, which could have addressed this issue head-on, chose an elliptical way of accomplishing the result suggested by the applicants. The intervener reminds the Board that the legislature seldom attempts to spell out all of the possible effects of a piece of legislation so that the absence from the statute of an effect, otherwise flowing from the plain meaning of the language, should not cause the Board to conclude that the effect was not intended.

19. Finally, the intervener maintains that freedom of association, as referred to in the Charter and in the international treaties cited by the applicants, does not go to the question of who is the legally certified bargaining agent. Where employees continue to be free to associate in a trade union, where, absent *Bill 179*, the displacement of an incumbent bargaining agent and the replacement of that bargaining agent with another is limited to certain prescribed times, and where the effect of *Bill 179* is limited to deferring the open period of one year, the intervener argues that section 13 of *Bill 179* is not in conflict with the *Charter of Rights*.

### *DECISION*

20. The issue is whether or not *Bill 179* operates to extend the collective agreements before us beyond the time as of which they would otherwise expire. If the collective agreements are extended by the provisions of *Bill 179*, these applications will not have been made "after the commencement of the last two months of its operation" as is required under section 5(4) of the *Labour Relations Act* and, therefore, will be untimely. A finding that the effect of *Bill 179* is to extend the collective agreements and to thereby close off the open period within which one trade union may seek to displace another has far-reaching ramifications upon the rights of employees, trade unions and employers under the *Labour Relations Act*. If the open period is closed for purpose of filing a timely displacement application for certification, it must also be closed for purposes of ascertaining the timeliness of an employee application to terminate bargaining rights and for purposes of giving notice to bargain under section 53 of the *Labour Relations Act*. If notice to bargain cannot be given the precondition to the



appointment of a conciliation officer under section 16, of the *Labour Relations Act* (both sections 53 and 16 of the *Labour Relations Act* are incorporated *mutatis mutandis* into the *Hospital Labour Disputes Arbitration Act*) cannot be satisfied so that the right to engage in a legal strike or lockout under section 72 of the *Labour Relations Act* and the right to the appointment of an arbitrator under section 5 of *The Hospital Labour Disputes Arbitration Act* are abridged. Our finding in this matter, therefore, may have far-reaching consequences with respect to the operation of the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act* in respect of those covered by *Bill 179*.

21. In light of the foregoing we accept the submissions of the applicants that every effort should be made to interpret *Bill 179* in a manner which does not interfere with the rights of employees under the *Labour Relations Act*. The *Labour Relations Act* establishes procedures whereby employees may select and be represented by a trade union of their choice, bargain collectively with their employer through their duly certified bargaining agent, and, at certain prescribed times, resort to economic sanctions against their employer in support of improved terms and conditions of employment, or, if covered by the *Hospital Labour Disputes Arbitration Act*, apply for the appointment of an arbitrator. The rights established under the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act* ought not to be interfered with by the operation of another statute unless it is manifestly clear on a reading of the other statute that such a result is intended. Even if we accept, as clearly we must on a reading of *Bill 179*, that compensation is to be regulated during the period of its operation, it does not necessarily follow that *Bill 179* abridges the right of employees under the *Labour Relations Act* to choose a bargaining agent at the times prescribed in the *Labour Relations Act* or to bargain collectively in respect on non-compensation matters. This tribunal, with its special expertise in labour relations, recognizes the importance of non-compensation terms and conditions of employment such as seniority, layoff and recall (especially in a time of recession), health and safety, grievance procedure and management rights. Notwithstanding the regulation of compensation, meaningful and substantial collective bargaining is nevertheless possible. We begin our analysis of the statutory language of *Bill 179*, therefore, from the perspective that, where the purpose of the Bill is to restrain compensation and where there is no language in the Bill expressly abridging the right of employees to choose a bargaining agent, to request conciliation or to engage in a legal strike under the *Labour Relations Act*, every effort should be made to harmonize the two statutes so as to preserve intact as much of the *Labour Relations Act* as is possible.

22. The critical language of *Bill 179*, for purposes of deciding the issue before us, is contained in section 13. The section continues in force without change "the terms and conditions of (a) every compensation plan that is extended or made subject to this part ... (b) every collective agreement that includes such a compensation plan," and is made to operate "notwithstanding any other act except the *Human Rights Code*, 1981 and section 33 of the *Employment Standards Act*. The submissions of the parties with respect to the purpose and meaning of section 13 of *Bill 179* have been set out. These submissions deal not only with the impact of *Bill 179* on the timeliness of representation applications but also with the impact of the Bill upon the collective bargaining process established under the *Labour Relations Act*. It is important, for purposes of interpreting the relevant provisions of *Bill 179*, to recognize the strong nexus between

representation rights and collective bargaining under the *Labour Relations Act* and the manner in which representation rights, collective bargaining and the right to resort to economic sanctions fit together as part of an integrated whole. Notwithstanding our natural attraction to the interpretation of *Bill 179* advanced by the applicants, there would be little point in straining the language of the Bill to preserve the open periods provided under the *Labour Relations Act* if the Bill could not also be interpreted as preserving some form of meaningful collective bargaining. More importantly, if the effect of preserving the open period allows the parties to reach a legal strike or lockout position at a time when they can not engage in collective bargaining the result is one that the legislature would not have intended.

23. The applicants, relying on the jurisprudence under section 79 of the *Labour Relations Act* and the judgment of the Ontario Court of Appeal in *Re Telegram Publishing Co. Ltd. and Zwelling et al*, *supra*, ask us to distinguish between the continuation of the terms and conditions of a collective agreement, as is provided for in section 13 of *Bill 179*, and the continuation of a collective agreement, which it maintains is not provided for in section 13 of *Bill 179*. We start by observing that the statutory language found in section 79 of the *Labour Relations Act*, is markedly different than that which the applicants ask us to give the same meaning to in section 13 of *Bill 179*. Section 79 of the *Labour Relations Act* speaks of freezing any “term or condition of employment” at a time when there is “no collective agreement in operation”. Section 13 of (Bill 179, on the other hand, speaks only to continuing in force “the terms and conditions of every collective agreement...” When reference is had to the definition of “collective agreement” in section 4(c) of *Bill 179* as “a collective agreement as defined in the *Labour Relations Act* ...” and to the obvious interrelationship between the two statutes, one would have expected the legislature to have used the statutory language of section 79 of the *Labour Relations Act* in sections 13 of *Bill 179* if it has intended to accomplish the same result. In our view, the failure of the legislature to speak in terms of continuing in force the terms and conditions of employment during the period when a collective agreement ceases to operate supports the conclusion that a different result was intended. The decision of the Court of Appeal in *Re Telegram Publishing Co. Ltd. and Zwelling*, *supra*, deals with what terms and conditions of employment are preserved after a collective agreement ceases to operate. The continuation of the terms and conditions of employment which were embodied in the collective agreement does not support the conclusion that statutory language extending the terms and conditions of a collective agreement does not also extend the agreement.

24. The difficulties inherent in the interpretation of section 13 of *Bill 179* advanced by the applicants become apparent if we accept, without finding, that section 13 means what the applicants say it means. Even if we accept that a collective agreement covered by the Bill ceases to operate on its expiry, as it ordinarily would, there is no question that the terms and conditions contained in the agreement continue in effect by virtue of section 13 of the Bill. If all of the terms and conditions contained in the collective agreement are continued there is nothing to negotiate and the distinction which the applicants seek to draw between the continuation of the terms and conditions of a collective agreement and the continuation of the agreement itself, insofar as the distinction results in some semblance of collective bargaining, is meaningless.



25. It is not surprising, therefore, that the applicants rely heavily on section 15 as providing the vehicle by which a trade union gets itself out from under the strictures of section 13 in order to seek, by agreement, to amend the non-compensation terms and conditions which would otherwise be continued under section 13 of *Bill 179*. The applicants maintain that following the expiry of the collective agreement (which they argue is allowed to happen under section 13) the amendments “by agreement” contemplated under section 15 of *Bill 179* may be brought about by recourse to the procedures for collective bargaining, including strike and lockout, provided under the *Labour Relations Act*. However, the plain language of the section does not support this result. The section applies to “the parties to a collective agreement” and speaks to the amending of “any terms and conditions of the collective agreement other than compensation...” Only the parties to a collective agreement may rely on the section and it clearly contemplates amendments being made to an existing collective agreement. In the result section 15 does not provide a vehicle for the renegotiation of the terms and conditions which are continued under section 13 after the time when the collective agreement would be allowed to expire. There is no provision in *Bill 179* which facilitates the renegotiation of these terms and conditions after the expiry of a collective agreement. Therefore, even if it could be held that the collective agreement is allowed to expire under section 13, there is no mechanism to facilitate the renegotiation of the terms and conditions which are continued. If, in the face of the clear limitations upon access to section 15, we were to adopt the applicants’ interpretation of section 13, collective agreements could expire, representation applications could be processed and legal strikes and lockouts could occur at a time when no collective bargaining could take place. As we have observed this is a result that the legislature would not have intended.

26. If we go one step further and assume, again without finding, that the applicants can somehow rely on section 15, at a time when they maintain that there is no collective agreement in operation, collective bargaining as envisaged under the *Labour Relations Act* with resort to strike and lockout cannot, as suggested by the applicants, take place. Even if the collective agreement ceases to operate its terms and conditions continue in force under section 13. Under section 42 of the *Labour Relations Act* “every collective agreement shall provide that there will be no strikes or lockouts so long as the agreement continues to operate” and if a collective agreement does not contain such a provision it is deemed to contain one. We would be hard pressed to find that the no strike/no lockout provision (because it may be expressly tied to the continued operation of the collective agreement) does not continue in force along with all of the other terms and conditions of the collective agreement which would normally expire at the same time by virtue of the termination clause. The continuation of the no strike/no lockout provision during the bargaining contemplated under section 15 of *Bill 179* would deprive the parties of the right to force agreement by means of strike or lockout. Even if section 13 is read as allowing collective agreements to expire when they otherwise would and section 15 is read as permitting the parties to an expired collective agreement to utilize the collective bargaining procedures established under the *Labour Relations Act*, the parties would nevertheless be unable to resort to strike or lockout as a means of securing agreement on revised terms and conditions of employment.

27. The language of section 14 of *Bill 179* also supports the conclusion that the legislature, when it provided that the “terms and conditions of every collective



agreement . . . shall continue in force” in section 13, intended to continue the collective agreement. Section 14 of *Bill 179* establishes the procedures to be followed in order to ensure that increases in compensation are within the statutory guidelines whenever a compensation plan is changed. There are two distinct procedures outlined. Under article 14(2), where “the administrator of a compensation plan that is not included in a collective agreement proposes to change any term or condition of the plan” the administrator shall apply to the Inflation Review Board to have the proposed change reviewed before it is implemented. Section 14(2) is clearly designed to regulate the unilateral decisions of an employer who is not party to a collective bargaining relationship in respect of any modification to a compensation plan. (An employer may be an administrator within the meaning of that term as defined in section 4(a) of *Bill 179*.) Indeed under section 14(2) the employer’s decision to change the compensation plan is required to trigger the review procedure and to thereby allow for implementation. Subsection (1) of section 14, on the other hand, deals with the procedure to be followed where “the parties to a collective agreement” cannot agree on the amount of the increase to, or the value of a compensation plan, or agree to change the compensation plan. The section, however, is expressly limited to “the parties to a collective agreement”. If we accept the applicants’ interpretation of article 13 and find that collective agreements are allowed to expire the parties to an expired collective agreement would be unable to bring themselves within either section 14(1) or section 14(2). There are no other procedures under *Bill 179* to monitor changes to compensation plans which are negotiated after a collective agreement has expired. Given the comprehensive monitoring procedures which are established and the general scope of the Bill, we cannot accept that the legislature intended such a result.

28. It is implicit in the applicants’ submissions that the words “the parties to a collective agreement”, which limit access to sections 14(1) and 15 of *Bill 179*, were intended to encompass the parties to a collective bargaining relationship regardless of whether or not party to a subsisting collective agreement. This interpretation would allow the parties to the collective agreement which the applicants maintain are permitted to expire under section 13 of *Bill 179* to nevertheless amend non-compensation terms and conditions “by agreement” under section 15 and to obtain approval for compensation plan increases under section 14(1) of *Bill 179*. The only reason one would strain the plain meaning of sections 14(1) and 15 in this way would be to provide some practical labour relations purpose for interpreting section 13(b) as the applicants have interpreted it. However, on the one hand, the applicants’ interpretation of section 13 suggests that the Legislature was acutely sensitive to the effect of contract expiry under the *Labour Relations Act*, while, on the other hand, the interpretation of sections 14(1) and 15 which is implied in the applicants’ submissions suggests that the Legislature was content to make a hazy and ill-defined distinction between the parties to a collective agreement and the parties to the collective bargaining relationship which continues after the collective agreement expires. In our view, the Legislature would not have been so inconsistent. The better approach, and the one we have followed, is to interpret section 13, which could be termed equivocal, in light of the plain words and clear meaning of sections 14(1) and 15.

29. The language of section 13 of *Bill 179*, when read in the context of the Bill as a whole, forces us to the conclusion that it was intended to extend the collective agreements brought within its ambit. The effect of this interpretation is to close out the open periods provided in the *Labour Relations Act* at the commencement of the last two

months of the operation of a collective agreement. This interpretation has a dramatic effect upon the operation of the *Labour Relations Act* in respect of representation applications, notice to bargain, appointment of conciliation officers and the right to strike or lockout. However, section 13 of *Bill 179* is expressly made to operate "notwithstanding any other Act". These are forceful words which, in the face of the definition of a collective agreement contained in *Bill 179*, as including a collective agreement under the *Labour Relations Act*, and the interrelationship between the two statutes, and in the absence of any saving language as is used in respect of the *Human Rights Code* and the *Employment Standards Act*, speak to the awareness of the legislature of the conflict between the two statutes and its intention that *Bill 179* prevail.

30. The rules and presumptions used in the construction of statutes relied upon by the applicants, apply where the language at issue is open to two interpretations. In our view, the relevant language of *Bill 179* does not admit to more than a single reasonable interpretation. The Bill extends the operation of collective agreements which would otherwise cease to operate and, in so doing may render untimely a representation application or prevent the appointment of a conciliation officer and consequently abridge the right to strike or lockout under the *Labour Relations Act* or the right to an arbitrator under the *Hospital Labour Disputes Arbitration Act*.

31. We now turn to the final leg of the applicants' argument. The applicants argue that insofar as *Bill 179* abrogates the freedom of association provided in section 2(d) of the *Charter of Rights*, it is null and void. Even if we accept, without finding, that freedom of association includes the freedom to be represented by a bargaining agent of one's choice, we are not convinced on the submissions before us that *Bill 179* abrogates that freedom in a manner that contravenes the Charter. Where, as in this jurisdiction, the right to be represented in collective bargaining by a trade union of one's choice is circumscribed by the statutory application of the majority principle, applied in respect of those in a bargaining unit found to be appropriate by this Board, and by the timeliness requirements under the *Labour Relations Act*, and where it is not, nor can be suggested, that these restrictions upon the freedom to be represented in collective bargaining by a trade union of one's choice are contrary to the Charter, we are not convinced that the fixed period extension of collective agreements under *Bill 179*, with the attendant impact upon the timeliness of representation applications under the *Labour Relations Act*, as in contravention of the Charter. It is to be observed that the extension of the instant collective agreements under *Bill 179* does not suspend the right of the employees covered by them to terminate bargaining rights or to choose another bargaining agent beyond the maximum 35 month period (section 5(5) of the *Labour Relations Act*) during which these rights may be suspended under the *Labour Relations Act*.

32. Having regard to all of the foregoing, we find that the collective agreements in the instant case are extended beyond their normal expiry dates by the application of section 13 of *Bill 179* so that these applications are untimely. We wish to make it clear that our analysis and conclusion in this case pertain to the effect of *Bill 179* on an existing collective agreement. We do not speak to the effect of *Bill 179* on the negotiation of a first agreement. In any event, these applications are hereby dismissed.

## DECISION OF BOARD MEMBER B. L. ARMSTRONG;

1. The purpose of the *Inflation Restraint Act* can be ascertained from its full title which is "An Act Respecting the Restraint of *Compensation* in the Public Sector of Ontario and the Monitoring of Inflationary Conditions in the Economy of the Province" [emphasis added]. The Legislature of this Province passed an act to restrain the compensation of a large segment of the working people of Ontario. The act contains a number of provisions which deal directly and explicitly with this objective. Indeed, the government can, without recourse to the Legislature, enact by regulation pursuant to section 25 that "any person, or class of person, or any agency, authority, board, commission, corporation, or organization of any kind" may be made subject to this Act, retroactive to September 21, 1982, provided such a regulation is "necessary for the restraint of public sector expenditure". It is clear to me that the Legislature intended by this Act to control or reduce inflation by controlling compensation.

2. Nevertheless, I am reluctantly driven to the same conclusion as my colleagues as to the meaning of the *Inflation Restraint Act* and its impact on collective bargaining. The language of section 13, when read together with sections 15 and 14 has forced this Board to find that the *Inflation Restraint Act* has not only purported to reduce compensation but has suspended collective bargaining for all of those employees and their unions who have been, or who might be, by government fiat, swept under its coverage.

3. Prior to the enactment of the amendments to the Constitution of Canada which enshrined the *Canadian Charter of Rights and Freedoms* as part of that Constitution and made it the supreme law of this country, our conclusion as to the interpretation of laws passed by our Provincial Legislature would have ended our inquiry. That is not the case now. This Board, which is required to administer and interpret the law as it impacts upon our proceedings in labour relations matters has both the right and the duty under section 52(1) of the *Charter of Rights* to determine whether the *Inflation Restraint Act* "... is consistent with the provisions of the Constitution" including the *Charter of Rights*, and if it is inconsistent, not to have regard to it, since the *Inflation Restraint Act* no longer would be of any force or effect.

4. The majority have found that the *Inflation Restraint Act*, by extending collective agreements, prevents two groups of employees from attempting to change the trade union which represents them in collective bargaining. In my opinion, the freedom of association recognized and protected by section 2(d) of the Charter must include the freedom to be represented in collective bargaining by a freely selected trade union. Any restriction on that freedom is *prima facie* contrary to section 2(d). Indeed, the examples of my colleagues which set out various provisions of the *Labour Relations Act* that impact on that freedom may well interfere with employees' freedom of association but are nevertheless necessary for stable and healthy collective bargaining. Since they are clearly reasonable limitations prescribed by law on the freedom of association, they are lawful and not contrary to the *Charter of Rights* in light of section 1 of the Charter.

5. While the limitations of the freedom of association set out in the *Labour Relations Act* are both reasonable and necessary, can the same be said for the impact of



the *Inflation Restraint Act* on that freedom? In my opinion, the answer is clearly no. One need look no further back than 1975, when the national anti-inflation program came into effect. Under that scheme employee compensation was restricted, and there was a limited impact on collective bargaining, but it did not end collective bargaining, nor did it eliminate the right to strike or lockout or the right to resort to interest arbitration or the right to change trade unions. My recollection is that inflation at that time was much higher than inflation is now, yet, collective bargaining was permitted to continue then but not now. Furthermore, I fail to see why the right to change trade union representation needs to be suspended in order to reduce compensation. The practical elimination of collective bargaining over the non-compensation provisions in a collective agreement was not then considered necessary to effectively complement the anti-inflation program in 1975 and is clearly not necessary now.

6. The wholesale gutting of the collective bargaining portion of the *Labour Relations Act* by the *Inflation Restraint Act* represents an unwarranted and totally unnecessary abrogation of the collective bargaining rights of a large segment of employees. The Legislature could have restrained compensation without suspending the rights of employees to select which trade union they wish to be represented by and without denying those employees the right to bargain effectively with their employers over non-monetary provisions in a collective agreement.

7. Given our unanimous interpretation of the meaning of the *Inflation Restraint Act*, it seems to me that the Legislature has attempted to piggy-back the elimination of collective bargaining rights for many workers of this province under the guise of restraining compensation. The government is both legislator and employer. As legislator, it could have accomplished its objective of restraining compensation without affecting the basic rights of workers in this province. It seems to me in this case that the government used its role as legislator to make its role as employer much easier. As employer, the government need not now engage in collective bargaining. It seems patently obvious to me that the government has used the current economic situation and the laudable objective of reducing inflation to unilaterally rob its employees and any other groups of workers it may choose to designate, of their collective bargaining rights.

8. It appears that the government has selected public sector employees to bear the brunt of its fight against inflation. Were those employees chosen for economic reasons? I think not. There are many sectors of our economy which have as much, if not more of an impact on inflation. The government could have imposed restraint not just on employees and the price of their labour, but on manufacturers for the price of their products, on landlords and builders for the price of accommodation, on lawyers, doctors, and dentists for the price of their services, and on financial institutions for their interest rates. I am convinced that the government choose to attack the collective bargaining rights of its employees as a matter of political expediency. That motivation does not, in my opinion, justify this suspension of free collective bargaining by public sector employees. The right of the provincial government to pass this kind of regressive anti-labour legislation is not unlimited. Its right to do so is limited, in this case, by the *Charter of Rights*, and generally by the will of the people of this province as expressed at the next provincial election.

9. I therefore find that the *Inflation Restraint Act*, to the extent it denies employees their freedom of association, is inconsistent with the constitution of Canada and is therefore, to that extent, of no force or effect. In my view, both of these applications for certification are timely, the ballots already cast ought to be counted and the matters referred to the Registrar.

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**1641-82-M International Association of Bridge, Structural and Ornamental Ironworkers Union, Local 759, Applicant, v. Caledon Steel Erectors Ltd., Respondent**

**Construction Industry Grievance – Whether lay-off or quit – Lay-off requested by employee deemed to be quit – Employee not entitled to benefits provided on lay-off**

**BEFORE:** Corinne F. Murray, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

**APPEARANCES:** *Maurice A. Green and Larrie Baillie for the applicant; Milanovic Tihomik for the respondent.*

**DECISION OF THE BOARD; January 20, 1983**

1. This matter involves a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*.

2. The applicant originally grieved that the respondent violated Article 6.3 of the collective agreement between Ontario Erectors Association, Incorporated and The Ontario Erectors Association and The International Association of Bridge, Structural and Ornamental Ironworkers and The Ironworkers District Council of Ontario comprised of Local Unions 700, 721, 736, 759, 765 and 786 operative from May 1, 1982 until April 30, 1984, in its treatment of Kevin MacLellan and R. Falk. The allegations with respect to R. Falk were settled and therefore the evidence and argument before us related solely to Mr. MacLellan. While the original grievance stated that Mr. MacLellan was improperly terminated, this aspect was not pursued at the hearing.

3. The applicant claimed at the hearing that Mr. MacLellan was laid off from a construction job at Marathon, Ontario, being performed by the respondent and therefore entitled to:

- (1) mileage and travel time for the return trip between Thunder Bay and Marathon, pursuant to Appendix C,
- (2) payment of 4 days "waiting time" because of the respondent's failure to forward Mr. MacLellan's wages within the time specified in Article 6.3.

4. The respondent claimed that Mr. MacLellan quit and therefore the payment of wages properly occurred pursuant to Article 6.4 of the collective agreement and Mr. MacLellan is not entitled to any travel time or mileage whatsoever.

5. The majority of facts are not in dispute. The respondent was engaged in a construction job in Marathon, Ontario (approximately 200 miles or 332 kilometres from Thunder Bay) and was required to use members of Local 759 of the International Association of Bridge, Structural and Ornamental Ironworkers in Thunder Bay. The job started on October 27, 1982. Mr. MacLellan travelled from Thunder Bay early that morning to report for work the same day. He was appointed the steward for the crew of 6 men by the Local. On November 4, 1982, he left Marathon and the job and returned to Thunder Bay. Between October 27th and November 4th Mr. MacLellan worked 8 days. The job itself was completed on Monday, November 8th. Mr. MacLellan did not claim that he worked hours and was not paid for them; his claim relates solely to the 4 day delay in receiving his final paycheque and the failure of the respondent to pay his travel time and mileage to and from Marathon. Mr. MacLellan claims that he should have received his final paycheque by registered letter mailed on or before November 8, 1982. In fact he did not receive his paycheque until November 12, 1982 by unregistered mail. Subtracted from the total wages payable was the travel time and allowance for the trip from Thunder Bay to Marathon already paid to him by his first cheque. Also his cheque did not include the payment for his travel time and allowance for the trip to Thunder Bay from Marathon on November 4. Enclosed with his paycheque was a Record of Employment form (Exhibit 5) completed by Mr. Tihomik showing the reason for issuing the record to have been because of "quit".

6. There is no dispute that during the 8 days Mr. MacLellan worked he and Mr. Milanovic Tihomik, the owner of the respondent and its on-site foreman for the Marathon job, had numerous conflicts as to what the collective agreement required the respondent to do. These conflicts were generally resolved by Mr. MacLellan telephoning Local 759 and receiving confirmation of the position Mr. MacLellan had taken. No grievances were ever filed because Mr. Tihomik generally complied with the interpretation Mr. MacLellan received from Local 759. He made nine such calls in 6 days. A telephone call was not required in cases where Mr. Tihomik could be satisfied that what Mr. MacLellan was claiming was "in the Book", meaning the collective agreement. Mr. Tihomik acknowledged that he was a member of Local 721 of the International Association of Bridge, Structural and Ornamental Ironworkers Union, a Local bound by the same collective agreement the Board is required to interpret in this case.

7. There is some dispute as to how Mr. MacLellan came to leave the job on November 4th. According to Mr. MacLellan, it was because of these ongoing difficulties he was having as steward trying to ensure that Mr. Tihomik followed the collective agreement that prompted him at 1:30 p.m. on November 4, 1982, to ask Mr. Tihomik for a layoff. While Mr. Tihomik immediately agreed, Mr. MacLellan nevertheless continued to work until 2:15 p.m. whereupon he claims he stated to Mr. Tihomik: "If you want to grant me layoff, I'll take it". Mr. Tihomik's response was "take your layoff". Mr. MacLellan said that he worked from 1:30 until 2:15 notwithstanding Mr. Tihomik's immediate agreement to lay him off so that he could "complete" the day. Mr. MacLellan claimed that Mr. Tihomik said he could not give him an orange



separation slip (Exhibit 1) supplied to Mr. Tihomik by Mr. MacLellan as steward on the job because he had ripped them up and thrown them away. In lieu of this Mr. Tihomik signed a cigarette package (Exhibit 2) stating:

“Kevin MacLellan  
Layoff  
Shortage of work”

8. Mr. Tihomik's version of the events leading up to Mr. MacLellan leaving the job is somewhat different. He said that Mr. MacLellan had to ask him three times on November 4, 1982, for a layoff before he would agree to letting him go. The first request was made between 1:00–1:30 p.m. was for layoff on the next day. Mr. Tihomik testified that he refused this request, explaining to Mr. MacLellan that the job was not finished yet and that he would get into trouble with the union if he laid a steward off first. Mr. Tihomik testified that a second request was made at approximately 1:45 p.m., this time for layoff in the evening of November 4, 1982. Mr. Tihomik said “if I don't get into trouble with the union...” Mr. MacLellan replied “no sweat”. Finally at 2:30 p.m., after coffee break, Mr. MacLellan asked Mr. Tihomik for his separation slip. Mr. Tihomik again refused, explaining that he would get into trouble with the union. Finally when Mr. MacLellan once again assured him there would be no problem, Mr. Tihomik agreed. Mr. Tihomik was quite categorical in his testimony about the conditions of his agreement to lay off Mr. MacLellan. He claimed he advised Mr. MacLellan he would be paid at the same time as the rest of the workers on the regular payday (November 11, 1982). Apparently nothing was said about Mr. MacLellan's travel time and allowance under Appendix “C”. He also claimed that he explained to Mr. MacLellan that one reason why he could not sign a yellow slip (Exhibit 1) was because he was quitting, and another was that he did not have a separation slip with him. He said he was willing to sign a cigarette box if Mr. MacLellan agreed he was quitting. He claimed the only reason Mr. MacLellan's Exhibit 2 was signed was his insistence that he needed something to show the union that he did not quit. Mr. MacLellan explained he could not stay any longer in Marathon because he had trouble with the Marathon police. For all these reasons Mr. Tihomik said he signed the cigarette box. The job continued until Monday, November 8th, and the paycheque for Mr. MacLellan was mailed out on the regular payday, November 11th. Mr. Tihomik said he did not register the envelope because November 11th was a holiday.

9. Mr. MacLellan categorically denied that he made three requests for layoff and that Mr. Tihomik said he was signing Exhibit 2 on the understanding that Mr. MacLellan agreed he was quitting. He denied he requested layoff for Friday, November 5th. He also denied that he explained his reason for requesting layoff was trouble with the police. He did, however, acknowledge he may have mentioned that beer was found in his car.

10. Article 2.10 of the collective agreement requires an employer to make payment to employees of an applicable commuting, travel, board, transportation or room and board allowance as set out in Appendix “C”. In section II of Appendix “C” (Travel – Initial & Return) the following is specified for Local 759:

## B. Local 759

(1) When an employee is sent to a job beyond eighty kms. (80) of the Labour Centre of Thunder Bay, Ontario, he shall be paid an allowance of Twenty-three (23) cents per km. *provided he remains on the job for thirty (30) working days or for the duration of the job, whichever is lesser.*

*In addition to the kilometer allowance, each employee will be paid one minute's pay at the prevailing rate for every kilometer traveled. The above to be paid on the employees [sic] first pay day.*

(2) *Should the job terminate or the employee be laid-off [sic] or discharged prior to the lapse of the forty-five calendar days, the employee shall be paid a return mileage and travel time allowance as in (1) above.*

(3) On jobs lasting more than forty-five (45) calendar days, an employee will be entitled to mileage and travel allowance to and from the job every forty-five (45) calendar days.

This shall be paid whether or not the employee actually returns to Thunder Bay and he shall receive his cheque for same at that time. If the employee has to leave the job due to accident, sickness, recognized holiday period, or any other legitimate reason mutually agreed upon by his foreman, it will not be considered a breach of his continuous employment for the purpose of receiving his return fare.

(4) *After forty-five (45) calendar days. At the termination of the job mileage and travel allowance as in (1) above to Thunder Bay will be paid to the employee.*

(emphasis added)

Article 6 – Lay-Off, Discharge and Quitting of Employees provides:

6.1 No employee shall be *laid off* during the first four (4) hours of his shift.

6.2. When an employee is *laid off*, where the Employer has a pay office within forty kilometers of the job site, he shall be paid in full on the job at the time of lay-off, and at the same time shall receive his O.H.I.P. Form 104, Record of Employment Certificate and Vacation Pay. Where the job is within the territorial jurisdiction of Local 759 such payment and provision of documents shall be within four working hours of the day of lay off, or in the case of out of town projects within four hours of reporting, personally if possible, to the Company's office provided however that in the case of employees working on shut down projects such period shall be

extended by one regular working day after termination of employment. Should an Employer fail to comply with these provisions and the Employee has to return later for his wages and/or forms, he shall be paid waiting time at straight time rates applicable to the regular working hours.

6.3 *Where an Employer has no pay office within forty kilometers of the job site in order to pay off the employees as above, then said Employer shall send such wages in full, together with the Record of Employment Certificate, Vacation Pay and O.H.I.P. Form 104, to the employee's last known address by Registered Mail within twenty-four (24) hours (one working day), of the time of the employee's termination. Where the job is within the territorial jurisdiction of Local 759 and there is no such pay office or if the pay office is outside of the territorial jurisdiction of Local 759 such action shall be taken within two working days, provided however that in the case of employees working on shut down projects such period shall be extended by one regular working day after termination of employment. Should an Employer fail to send such wages and/or forms as above within the prescribed twenty-four (24) hour period then said employee shall be paid any waiting time in excess of the said twenty-four (24) hour period at straight time rates of pay applicable to the regular working hours.*

If the Employer has not mailed (registered mail) the required wages and Forms stipulated above; a grievance must be initiated within five (5) working days, otherwise the Employer will not be required to pay waiting time beyond three (3) days.

6.4 *When an employee quits of his own accord he must give notice to the Employer and must obtain a copy of his referral slip which will indicate he has quit, before the Union can issue another referral to him provided the Employer retains and completes the termination slip, and he shall wait until the regular pay day for his wages, O.H.I.P. Form 104, Record of Employment Certificate and Vacation Pay. If it becomes necessary for the employee to wait beyond the regular pay day, following the giving of such notice for his wages and/or forms because said forms, pay, etc., are not ready, then he shall be paid waiting time at straight time rates applicable to regular working hours.*

Except in extenuating circumstances an employee shall be deemed to have quit if he does not report for work for two full working days without contacting the Employer within such period giving a reasonable explanation for his absence.

6.5 *When an employee is discharged he shall receive his wages, O.H.I.P. Form 104, Record of Employment Certificate and Vacation Pay in accordance with the terms of Article 6.3 above.*



6.6 Employees will be given sufficient time during working hours in order to return an employer's tools and equipment to the tool crib or stores when being laid off.

6.7 (a) *On termination*, the employee shall receive a termination slip if supplied by the Local Union at the time of hiring, stating the reasons for termination and signed by an authority of the Employer. The termination slip should be kept at the job-site.

(b) Where Ironworkers are laid off or discharged from jobs where they are accommodated in a camp they will be paid one hour at straight time rates in which to pick up personal gear.

6.8 *On termination*, the Employer's representative on the job site will indicate on the termination slip the number of hours to which the employee is entitled for the week during which the termination takes place.

(emphasis added)

Article 23.1 provides in part:

... The Employer agrees that when employees are laid off, the Steward shall be notified prior to the lay-offs, and all things being equal, the Steward will be the last man laid off.

11. Article 6 indicates that the method by which and time within which payment of final wages and Vacation Pay together with delivery of the Record of Employment Certificate and O.H.I.P. Form 104 must be made varies according to two sets of circumstances. Where the employee ceases employment by the unilateral act of the employer (i.e., layoff or discharge) Articles 6.2 and 6.3 apply. Where the employee ceases employment by his/her own unilateral act (i.e., quit) Article 6.4 applies. A major difference between the two types of circumstances is the speed within which the concluding payment and delivery of the above-noted documentation must be accomplished. In the case of layoff and discharge there is a shorter time period allowed, presumably in recognition of the fact that the employer has control over the act of termination itself and therefore ought to be able to meet relatively short deadlines. Another important difference between employer obligations regarding payment to those laid off or discharged and to those who quit is that the payment, together with documentation, must go to the employees by registered mail. The penalty for ignoring the deadlines set out in Article 6.2, 6.3 or 6.4 is payment of "waiting time". No mention is made in Article 6 of a "separation slip" (the name printed on Exhibit 1), but Articles 6.4, 6.7 and 6.8 require that in all instances of termination (be it layoff, discharge or quit) a termination slip must be filled out by the employer stating reasons for termination and the number of hours to which the employee is entitled for the week during which termination takes place where such slips are supplied by the union.

12. Appendix "C" does not mention explicitly what occurs where an employee quits prior to the termination of a job. The travel allowance to the site is payable only if he "remains on the job for thirty (30) working days". No similar condition appears to

be explicitly attached to the receipt of the travel time payment of one minute's pay per kilometer. A literal reading of Appendix "C", subsection B(1) would indicate that if the employee fails to remain on the job for 30 working days because he/she has been discharged, he would be disentitled to his travel allowance *to* the work site but would be entitled under section B(2) to his return mileage [sic] and travel time. Reading Article 6 together with Appendix "C" we conclude that the intention of the parties was to carve out two different sets of circumstances regarding the timing of payment together with delivery of terminating documentation and the payment of travelling time and allowance depending on whether the termination has resulted from the act of the employer (job termination, layoff or discharge) or the act of the employee (quit). In the case of the latter there would be no requirement to pay any travel time and allowance pursuant to section B(1) of Appendix "C" if the quit took place prior to 30 working days or completion of the job because the employees had not remained on the job for the required time and the final payment of wages together with delivery of terminating documentation could wait until the next regular payday and be sent by regular mail pursuant to Article 6.4. Conversely, if the employer had laid off or discharged the employees prior to the 30 working days or the job's completion, then the travel time and allowances had to be paid for the complete return trip and payment of wages and vacation pay would proceed in accordance with Article 6.3..

13. In view of this interpretation of the collective agreement, the threshold question is whether Mr. MacLellan quit or not. While the applicant did not cite any authority for its claim that Mr. MacLellan was laid off, arbitrators are generally agreed that in determining whether or not an employee has quit his employment the basic task confronting them is to ascertain the intention of the employee involved. The right to resign or quit one's employment is peculiar to the employee, being a mechanism available to an employee to terminate a relationship correlative with the employer's tool of termination, the act of discharge (see Brown & Beatty, *Canadian Labour Arbitration* at p. 393 ff). Layoff has been recognized by arbitrators as a method by which an employer may reduce his employment complement. For this reason any severance of the employment relationship which is effected or initiated by the employee cannot properly be characterized as a layoff (See Brown & Beatty, *Canadian Labour Arbitration* at pp. 235-236).

14. Having considered all of the evidence, it appears that both Mr. MacLellan and Mr. Tihomik for any number of reasons wanted to be rid of each other. Whether the request for layoff occurred one or three times matters little; the fact is a request was made which offered a graceful way out of a thorny situation. We find that Mr. MacLellan assured Mr. Tihomik there would be no trouble from the union if he were laid off. We find that Mr. Tihomik probably did indicate to Mr. MacLellan that he was signing Exhibit 2 on the understanding he was quitting, so that Mr. Tihomik would not feel he was putting himself in a vulnerable position by signing Exhibit 2. On the basis of these conditions, Exhibit 2 was signed. This does not, however, make the transaction a layoff. This is a situation where an employee no longer wishes to remain on the job and requests a layoff. In doing so, he exhibits an intention to exercise his right to resign. It is not an exercise of the employer's right to reduce his work force in response to reduced need.

15. For all these reasons we dismiss the grievance.

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**1610-82-M; Canada Forgings**, a Division of Toromont Industries Ltd., Employer, v. International Union, United Automobile, Aerospace, Agricultural Workers, Local 275, Trade Union

**Conciliation – Reference – Whether collective agreement terminated by giving of notice – Whether resulting in unspecified term contrary to Act – Board finding request for conciliation untimely**

**BEFORE:** George W. Adams, Q.C., Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

**APPEARANCES:** *R. C. Fillion and J. W. Fraser for the employer; Stephen Krashinsky, Jim Porter and Tim Kelly for the trade union.*

**DECISION OF GEORGE W. ADAMS, Q.C., AND B. L. ARMSTRONG;** January 14, 1982

1. In this matter, the Minister has referred to the Ontario Labour Relations Board, pursuant to section 107 of the *Labour Relations Act*, a question related to his authority to appoint a conciliation officer in the circumstances of this request. Specifically, the question is whether a collective agreement continues to be in existence between the parties subject to this reference.

2. The position taken by the employer on the question is set out in its letter of November 8, 1982 to Mr. L. V. Pathe, Assistant Deputy Minister of Labour. The letter reads:

Mr. L. V. Pathe,  
Assistant Deputy Minister,  
Industrial Relations Division,  
Ontario Ministry of Labour,  
14th Floor,  
400 University Avenue,  
Toronto, Ontario.

Dear Mr. Pathe:

Re: Canada Forgings, A Division of Toromont Industries Ltd.; and  
The International Union, United Automobile, Aerospace, Agricultural Implement Workers, Local 275, UAW, OFL, CLC  
(Employees at the Heavy Forge Plant and the Drop Forge Plant)

We act for Canada Forgings, the employer in the above-mentioned matter. Accordingly, we have been requested to respond to your letter of November 2, 1982.

It is the company's position that its Request for Appointment of a Conciliation Officer is timely and unobjectionable. The duration clause of the collective agreement, Article 18, provides:



"18.01 This Agreement shall remain in full force and effect from May 1, 1981 to April 30, 1984 and from year to year thereafter, subject to the rights of either party, to terminate the same by giving sixty (60) days' notice of termination to the other party. Such notice of termination to be applicable only after the Agreement has been in force for a period of not less than ten (10) months."

In accordance with this clause, the company gave the union sixty days' notice of termination of the collective agreement by letter dated October 15, 1982. In that letter, the company also gave notice to its desire to bargain pursuant to Section 53 of the Ontario Labour Relations Act. The Application for Conciliation was subsequently made on October 22, 1982.

In our respectful submission, therefore, all provisions of the Act and the collective agreement have been complied with and the union's objection to the Request for Appointment of a Conciliation Officer is without merit.

If there is any question as to whether a Conciliation Officer should be appointed, we respectfully request that the matter be referred to the Ontario Labour Relations Board pursuant to Section 107(1) of the Act. Since time is of the essence, we respectfully request that the referral to the Board be made as soon as possible.

Yours very truly,

3. The position taken by the trade union on the question is set forth in its letter of October 28, 1982 which reads:

Ministry of Labour,  
400 University Avenue,  
Toronto, Ontario.  
M5G 1S5

Dear Sirs:

*Re: Canada Forgings Ltd.*

The Union contends that the application by Canada Forgings, a Division of Toromont Industries Ltd., Welland, Ontario for the appointment of a conciliation officer to renew the contract between themselves and Local 275, U.A.W. is both untimely and illegal.

The present agreement should remain in force and effect until April 30, 1984. The reference to the 60 days notice of termination to the other party described in Article 18.01 of the current agreement has always been interpreted to reflect that part of the clause which refers to "and from year to year thereafter".

In the opinion of the Union this application is premature and indeed, is a misuse of the services of the Ministry of Labour due to the fact that the current agreement has eighteen months still to run.

Yours very truly,

JIM PORTER, REPRESENTATIVE  
INTERNATIONAL UNION, U.A.W.

4. A further letter of the company dated October 15, 1982 and addressed to Mr. Jim Porter of the union sets out the company's motivation in seeking to terminate the collective agreement. It reads:

Mr. Jim Porter,  
United Automobile, Aerospace,  
Agricultural Implement Workers of America,  
11 Bond Street,  
Room 202,  
St. Catharines, Ontario.  
L2R 4Z4

Dear Mr. Porter:

On September 13, 1982 we requested by letter to Mr. T. Kelly, Unit Chairman, the opportunity of re-opening our current collective agreement with the view to wage corrections now necessary due to the current economic outlook. Your letter of September 28th refused to re-open the contract because of a democratic mandate from our employees.

We subsequently discussed this matter at a monthly meeting with our Negotiating Committee. We further discussed this possible re-opening at a dinner meeting with you and you indicated you would endeavour to contact the Canadian Director to obtain permission to re-open. You were unable to make such contact and suggested that I personally approach Mr. Robert White the Canadian Director.

I have been unsuccessful in contacting Mr. White and because time is now of the essence the Company hereby gives you 60 days notice of termination of the agreement in accordance with Paragraph 18.01 of our collective agreement. This letter also serves notice of the Company's desire to bargain pursuant to Section 53 of the Ontario Labour Relations Act.

We will in the interim, of course, be pleased to meet at any time with you and the Negotiating Committee. Our proposed amendments are as outlined in ours of September 13th, but we reserve the right to modify and/or add to same after mid November, when an additional cost or living increase will be implemented. This "magic"

date is important in order that we obtain the savings requested without "take aways" from the current wage and benefit levels.

We have always cooperated in the past to your Union's desire to expedite the conciliation process so as to avoid its impeding a settlement. Your reciprocal cooperation in this instance re conciliation services will be appreciated.

As noted earlier the Company stands ready to meet you and your Negotiating Committee at a time and place of your convenience.

Yours very truly,

CANADA FORGINGS  
A Division of Toromont  
Industries Ltd.

J. W. Fraser  
President

5. Article 18 is entitled "Duration of Agreement" and, in its entirety, reads:

18.01 This Agreement shall remain in full force and effect from May 1, 1981 to April 30, 1984 and from year to year thereafter, subject to the rights of either party, to terminate the same by giving sixty (60) days notice of termination to the other party. Such notice of termination to be applicable only after the Agreement has been in force for a period of not less than ten (10) months.

18.02 Within sixty days' period prior to the expiry date of this Agreement either party may submit in writing to the other party amendments, alterations or modifications of this Agreement. On ten (10) days' clear notice within the sixty day period, either party may request the other party to enter into negotiations for the renewal or modifications of this Agreement.

18.03 In the event of notice of amendment, modification or alteration of this Agreement, it shall remain in full force and effect while negotiations are being carried on for the renewal of the Agreement.

18.04 Notice shall be in writing and shall be sufficient if sent by registered mail addressed, if to the Union, to Local 275, U.A.W. Welland, Ontario and if to the Company, addressed to the Manager, Canada Forgings, a Division of Toromont Industries Ltd., Welland, Ontario.

6. From 1948 until 1956 the parties negotiated collective agreements without a specific term and the provisions analogous to Article 15 of the 1948 Agreement which provided:



ARTICLE XV.  
DURATION OF AGREEMENT

This Agreement shall remain in full force and effect from the date of signing from year to year thereafter, subject to the rights of either party to terminate the same by giving sixty (60) days' written notice of termination to the other party. Such notice of termination to be applicable only after the Agreement has been in force for a period of not less than ten (10) months.

Within sixty days period prior to the annual expiry date of this Agreement, either party may submit in writing to the other party amendments, alterations or modifications of this Agreement. On ten (10) days clear notice within the sixty day period, either party may request to other party to enter into negotiations for the renewal or modification of this Agreement.

In the event of notice of amendment, modification or alteration of this Agreement, it shall remain in full force and effect while negotiations are being carried on for the renewal of the Agreement.

Notice shall be in writing and shall be sufficient if sent by registered mail addressed, if to the Union, to Local 275, UAW-CIO, Welland, Ontario, and if to the company, addressed to the Manager, Canada Foundries and Forgings Limited, Welland, Ontario.

7. This clause appears to have been first altered to take on its current form by the agreement negotiated to be effective from May 1, 1956 until May 1, 1958 and in that agreement Article 19 provided:

ARTICLE XIX

DURATION OF AGREEMENT

97. THIS AGREEMENT shall remain in full force and effect from May 1, 1956 until May 1, 1958 and from year to year thereafter, subject to the rights of either party to terminate the same by giving sixty (60) days' written notice of termination to the other party. Such notice of termination to be applicable only after the Agreement has been in force for a period of not less than ten (10) months.

98. Within sixty days' period prior to the expiry date of this Agreement, either party may submit in writing to the other party amendments, alterations or modifications of this Agreement. On ten (10) days' clear notice within the sixty days period, either party may request the other party to enter into negotiations for the renewal or modification of this Agreement.

99. In the event of notice of amendment, modification or alteration of this Agreement, it shall remain in full force and effect while negotiations are being carried on for the renewal of the Agreement.

100. Notice shall be in writing and shall be sufficient if sent by registered mail addressed, if to the Union, to Local 275, UAW-CIO, Welland, Ontario, and if to the Company, addressed to the Manager, Canada Foundries and Forgings Limited, Welland, Ontario.

Signed on behalf of the Company.

We further note that Appendix "D" to that agreement set out the wage rates on pages 31 to 35 and the Appendix then ended with the following paragraph:

The rates outlined in Appendix "D" of this Agreement shall become effective April 14, 1956, and shall remain in effect until May 1, 1957 at which time an increase of six (6) cents per hour will be added to all classifications.

8. Finally, the following provisions of the most current collective agreement are also relevant to our determination:

3.01 Employees who are members of the Union as of the effective date of this Agreement shall retain such membership *for the life of this Agreement* as a condition of employment.

[our emphasis]

• • •

3.04 *During the life of this Agreement*, the Company will deduct from the earnings of all employees in the Bargaining Unit initiation fees where applicable and dues laid down by the constitution and by-laws of the Union. The amount of such deductions shall be advised by letter from the Financial Secretary of the Local Union to the Company. At the end of each calendar month and prior to the 10th day of the following month the Company shall remit by cheque to the Financial Secretary of the Local Union the total sum of the deductions made, together with a list of names from whom deductions were made, and including the names of those from whom no deductions were made and the reason for no deduction. All such deductions to be made from employees first pay of the calendar month provided the employee has worked 32 hours in such pay period. Failing this, the deduction will be made from the next pay period meeting the hours worked requirement.

[our emphasis]

• • •

9.01(a) The following shall be recognized as holidays and paid for by the Company. Included are New Year's Day, Dominion Day and Christmas Day.

	1981	1982	1983	1984
January 1		b		
Good Friday		b	c	d
Victoria Day	a	b	c	
Dominion Day	a	b	c	
Labour Day	a	b	c	
Thanksgiving Day	a	b	c	
December 19			c	
December 20			c	
December 21			c	
December 22			c	
December 23		b	c	
December 24	a	b		
December 25	a			
December 26			c	
December 27		b	c	
December 28	a	b	c	
December 29	a	b	c	
December 30	a	b	c	
December 31	a	b		

a - Denotes 1981 Holidays

b - Denotes 1982 Holidays

c - Denotes 1983 Holidays

d - Denotes 1984 Holidays to expiration of agreement.

[our emphasis]

11.08 The Cost of Living Allowance is ten cents (10¢) per hour effective May 1, 1981. Thereafter during the term of this Agreement wages will be adjusted up or down in accordance with each thirty-five hundredths (.35) change in the consumer price index (CPI) as published by Statistics Canada.

11.13 *Effective May 1, 1982 and May 1, 1983 the cost of living allowance then existing will be "folded in" to the base wage rates except for 10 cents which will remain.* This is on the condition that the cost of living allowance

[our emphasis]

exceeds 10 cents on the above-noted anniversary dates of this Agreement.



• • •

## ARTICLE XIII – INSURANCE PLANS

### Life Insurance Coverage – Employees and Pensioners

#### 13.01(a)

<i>Employees</i>	May 1/81	May 1/83*
1. Death Benefit	\$13,500	\$15,000
2. A.D & D.	\$14,500	\$15,000

#### *Pensioners*

The life insurance coverage for pensioners shall be \$1000.00. Those pensioners who do not qualify for a Canada Pension Plan Death Benefit will be covered for an additional \$500.00 effective May 1, 1981.

(b) Permanent Total Disability Benefit (available to employees disabled prior to age 60).

At commencement of disability – \$4000; monthly for 24 months – \$400.

\* Effective May 1, 1983 these amounts increase to \$4500. and \$450 respectively.

13.02(a) Minimum Benefit – \$200. per week. \*Effective May 1, 1982 – minimum benefit \$210. per week. Effective May 1, 1983 – minimum benefit \$220. per week.

(g) Details of the terms and conditions of the plan are contained in the Supplemental Agreement – \*Non-Occupational Temporary Disability Benefit Plan May 1, 1981 to April 30, 1984.

[\*our emphasis]

## ARTICLE XIV – PENSIONS

14.01 The Pension Agreement dated October 1, 1965 and revised May 1, 1978 will be continued in force until April 30, 1984 as amended by the following provisions:

(a) The monthly basis pension per year of credited service (with no maximum on credited service) is as follows for eligible employees retiring after the dates shown hereunder:

May 1, 1981	May 1, 1982	May 1, 1983*
\$8.50	\$9.00	\$9.50

(b) The monthly supplemental pension per year of credited service not in excess of 25 years for each eligible employee retiring after the date shown hereunder is as follows, reduced by the amount of any unreduced statutory benefit payable to him:

May 1, 1981	May 1, 1982	May 1, 1983 *
\$8.50	\$9.00	\$9.50

(c) The Basic monthly pension of each pensioner in the plan as at May 1, 1981 shall be increased by \$112.50 per month effective May 1, 1981

#### ARTICLE XV - SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN

\*15.01 The S.U.B. Agreement executed July 7, 1966 and revised May 1, 1978 will be continued in force until April 30, 1984.

• • •

17.12 ... The Company will contribute \$40.00 per year per employee towards the purchase of safety shoes. \*Effective May 1, 1983 this allowance will be increased to \$50.00.

[\*our emphasis]

Representative of wording found throughout Appendix "A" is at page 64 of the collective agreement which provides:

#### APPENDIX "A" SKILLED TRADES CLASSIFICATIONS DROP FORGE

	May 1, 1981	May 1, 1982	May 1, 1983
Blacksmith	10.22		
Bricklayer	10.12		
Carpenter	10.12		
*Die Finisher	10.01		
*Die Repair	9.69		
Die Sinker	11.05		
Electrician	10.34		
Engineer 2nd Class	10.55		
Engineer 3rd Class	10.34		
Instrument Technician	10.45		
Machine Repairman	10.50		
Machinist	10.45		
*Machinist, Single Purpose	9.96		

Millwright	10.22
Tool & Die Maker	10.45
Welder	10.34

Lead Hands – 15¢ over top group rate  
 Group Leaders – 25¢ over top group rate

Rates will be increased by 30¢ effective May 1, 1982 and 30¢ May 1, 1983. In addition, rates are subject to increase effective those dates in accordance with Clause 11.13 of this Agreement relating to “fold-in” of cost of living allowance.

#### IN ADDITION

\*Non-apprenticeable skilled trades rates will increase 5¢ per hour effective May 1, 1982.

Apprenticeable skilled trades rates will increase 5¢ per hour effective May 1, 1982 and 5¢ on May 1, 1983.

#### SUBMISSIONS

9. On behalf of the company it was submitted that although Article 18.01 of the collective agreement amounted to a very unusual termination clause and, unless something in the Ontario *Labour Relations Act* rendered the provision unlawful, this Board was obligated to accept its full force and effect. Counsel submitted that the agreement, by its terms, terminated by either party giving 60 days' notice provided that the agreement had been in force not less than 10 months. Counsel argued that such notice was given by the company and that nothing in section 52 of the *Labour Relations Act* precluded this Board from giving effect to the provision and advising the Minister that he was required to appoint a conciliation officer to confer with the parties pursuant to section 16(1) of the Act.

10. On behalf of the Union it was submitted that the agreement provided for a term running from May 1, 1981 to April 30, 1984 and that the 60-day notice of termination set out in Article 18.01 applied only to the continuation of the agreement “from year to year thereafter” if the agreement was not terminated on its April 30, 1984 expiry date. It was counsel's submission that the only method of early termination provided for by the Act is by way of a joint application of the parties pursuant to section 52(3) and that the instant application is not such a joint application. Counsel argued that the Act demanded a fixed termination date observable to third parties on the face of the collective agreement in order that the possibility of termination or replacement applications not be undermined. It was contended that if the company's interpretation of Article 18.01 were correct, the policy behind section 52(3) of the Act would be impaired and the 3-year bargain struck by the parties destroyed. It was therefore submitted that the Board should give Article 18.01 that interpretation having the greatest harmony with the scheme of the Act and collective bargaining reality. The Board was referred to *Otto's Deli*, [1980] OLRB Rep. Nov. 1673; *Canadian Chemical Workers Union*, [1980] OLRB Rep. July 952; *The Continental Group of Canada*



*Limited*, 52 CLLC ¶ 17,020; *Rowson's Tavern*, 54 CLLC ¶ 17,077; *C. W. Henderson Cartage Limited*, [1961] OLRB Rep. Oct. 252 and *Re Bradburn et al and Wentworth Arms Hotel Limited et al* (1978), 94 D.L.R. (3d) 161 (S.C.C.).

## REASONS

11. If the company's interpretation of Article 18.01 was correct, we are of the view that the operation of the collective agreement would be "for an unspecified term" within the meaning of section 52(1) of the *Labour Relations Act*. As the Board stated in *Norfolk Knitters Limited*, [1973] OLRB Rep. Apr. 202 the policy of the Act requires that the commencement of the last two months of the operation of any collective agreement must be clearly determined at the time the collective agreement is signed. The reason for this statutory requirement can be discerned from those provisions of the Act dealing with the timeliness of applications for certification or the termination of bargaining rights. More specifically, sections 5(4), 5(5), 5(6), and 57(2) provide:

5(4) Where a collective agreement is for a term of not more than three years, a trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last two months of its operation.

(5) Where a collective agreement is for a term of more than three years, a trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be.

(6) Where a collective agreement referred to in subsection (4) or (5) provides that it will continue to operate for a further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, a trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement during the further term or successive terms only during the last two months of each year that it so continues to operate, or after the commencement of the last two months of its operation, as the case may be.

57(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board

for a declaration that the trade union no longer represents the employees in the bargaining unit.

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

12. When the provisions of section 52 of the Act are read against those of sections 5 and 57, it can be seen that the statute envisages and requires that collective agreements have a fixed term of operation. The Act then deals specifically with the timeliness of certification and termination applications in relation to agreements for a term not more than three years and agreements for a term of more than three years. If the company was correct in its interpretation, the collective agreement in question could have at least three possible expiry dates, a feature clearly not contemplated by sections 5(4) and 57(2)(a) and a feature that would deprive third parties of any certain knowledge on when a termination or certification application might be filed. The integrity of this scheme is protected by requiring parties to apply jointly to the Board pursuant to section 52(3) where they wish to terminate their agreement early. Section 52 provides:

52(1) If a collective agreement does not provide for its term of operation or provides for its operation for an unspecified term or for a term of less than one year, it shall be deemed to provide for its operation for a term of one year from the date that it commenced to operate.

(2) Notwithstanding subsection (1), the parties may, in a collective agreement or otherwise and before or after the collective agreement has ceased to operate, agree to continue the operation of the collective agreement or any of its provisions for a period of less

than one year while they are bargaining for its renewal with or without modifications or for a new agreement, but such continued operation does not bar an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit and the continuation of the collective agreement may be terminated by either party upon thirty days notice to the other party.

(3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

(4) Notwithstanding anything in this section, where an employer joins an employers' organization that is a party to a collective agreement with a trade union or council of trade unions to be bound by the collective agreement between the trade unions and the employers' organization, the agreement cease to be binding upon the employer and the trade union or council of trade unions at the same time as the agreement between the employers' organization and the trade union or council of trade unions ceases to be binding.

(5) Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

13. However, to accept either the company's submission in its entirety or conclude that this collective agreement provides for an unspecified term would be, in our view, quite consistent with the real intent of the parties. The first sentence of Article 18.01 states specifically that the agreement "shall remain in full force and effect from May 1, 1981 to April 30, 1984...". Moreover, as the selected provisions of the agreement reproduced above reveal the parties have specifically bargained that certain key provisions of the agreement continue throughout the three years or become effective in years 1982, 1983, or 1984. Different plant holidays are in effect during different years; a shoe-allowance is increased in May 1983; cost of living allowances are to be folded in on May 1, 1982 and May 1, 1983; insurance plans, the disability benefit plan and the pension plan are all to be enriched in 1982 and 1983. The parties have also provided that the unemployment benefit plan and the pension plan are all to be enriched in 1982 and 1983. The parties have also provided that the unemployment benefit plan is to be continued in force until April 30, 1984. COLA payments are provided for to 1984 and we also note that paragraph 9.01(a) specifically acknowledges the agreement expires in 1984. All of these provisions indicate that the parties have spent considerable time and energy at the bargaining table agreeing upon detailed terms and conditions of employment that are to take effect during 1982, 83 and 84. It is drafted as a three year agreement in every respect. If we were to accept the company's interpretation or hold that, by virtue of section 52(1) of the Act, the collective agreement is deemed to provide for a term of one year all of this bargaining and compromise would have been for nought. That the parties intended such a result is highly improbable.



14. It is our view, therefore, that the Board should adopt the interpretation of Article 18.01 which is most consistent with both the scheme of the Act and collective bargaining reality. In our opinion, that interpretation is the one proposed by the trade union. More specifically, we are of the view that the parties have provided for a collective agreement to be in “full force and effect from May 1, 1981 to April 30, 1984...”. They have also provided that the collective agreement may continue “from year to year thereafter” and if it does “subject to the rights of either party, to terminate the same by giving sixty (60) days notice of termination to the other party. Such notice of termination to be applicable only after the agreement has been in force for a period of not less than ten (10) months.”

15. The last sentence of Article 18.01 is more reasonably referable to the termination of any agreement extending beyond the fixed term of May 1, 1981 to April 30, 1984 when regard is had to the history of this article and the fact that Article 18.02 clearly envisages only one expiry date to the agreement. Prior to 1956 the collective agreements did not provide for a fixed term and thus it was important to have language providing for the termination of the agreement and at the same time providing for at least a minimum period of the agreement, i.e., ten months. In 1956, the parties for the first time provided for a collective agreement of a fixed duration (2 years) but also continued the concept of the potential continuation of the collective agreement “from year to year thereafter”. Having provided for the continuation of that concept, it was only natural that they continue the earlier method employed to terminate the annual renewal of the agreement. We think they clearly indicated their intent to have a contract with a fixed term of two years in 1956 and three years in 1981 by eliminating in Article 18.02 any reference to an “annual expiry date” which clearly arose in those collective agreements negotiated before 1956 and which would have continued to be the case of the company’s interpretation was correct.

16. In our view, Article 18.02 deals specifically with the conduct of the parties immediately prior to the expiry of the collective agreement on April 30, 1984 in order that they may effectively engage in negotiations for the renewal or modification of the agreement. Article 18.03 then goes on to provide for a contractual arrangement between the parties while negotiations are being carried on and this provision must be seen in the context of section 52(2) of the *Labour Relations Act* amended, we might add, after the decision of *Re Bradburn et al and Wentworth Arms Hotel Limited et al*, supra. It goes without saying that the Board is not unsympathetic with the company’s apparent economic situation nor are we suggesting what the trade union’s response to this situation ought to be. We are limited to providing our opinion on the contractual intent of the parties.

17. For all of these reasons, it is the Board’s opinion that a collective agreement continues to be in existence between the parties and that the Minister does not have authority to make an appointment pursuant to section 16(1) of the Act.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. In this application there is not a whiff of the taint of anti-union animus in breach of the Act. Counsel for the employer invited the Board to take note that it was dealing with a three year contract beginning in May, 1981, with the employer in the worst possible position as a result of the depth of the current recession.

2. In my opinion, the rule of contractual interpretation that the parties intend the clear meaning of the words they use in their agreement, remains yet a valid rule with respect to collective agreements. There is no ambiguity in the wording of clause 18.01 on its face. There is no evidence of even a unilateral mistake. There is no need to take extrinsic evidence into account.

3. The clear meaning of clause 18.01 is that the contract must run for at least one year. That requirement is but compliance with the Act. The wording is also clear that either party may bring the agreement to an end by giving the requisite timely notice to April 30, 1982 or April 30, 1983 or, of course, April 30, 1984. This Type of termination clause, available to both parties, is not novel to commercial activity.

4. That the parties have contemplated that both will need to remain satisfied with their agreement until April 30, 1984 (or thereafter), and have gone to the trouble of including changes in the agreement in order to enhance the possibility of satisfaction, does not alter or detract from the plain and simple purpose of clause 18.01. If *either* party becomes dissatisfied, the contract may be terminated after one, two or three or more years.

5. The majority expresses concern in paragraph 12 regarding the ability of third parties to know when a termination or certification application might be timely. I simply wish I could reconcile that concern with the results of two recent cases, *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954 and *Re K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421. In both those cases the unilateral actions taken by the unions in question were upheld by the Board to the detriment of the rights of third parties under s.57 of the Act.

6. In my opinion the Minister does have authority to make an appointment pursuant to section 16(1) of the Act.

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**0275-82-M International Union of Operating Engineers, Local 793, Applicant, v. Operating Engineers Employer Bargaining Agency and Ellis-Don Limited, Respondent**

**Construction Industry Grievance – No dispute that person hired to operate elevator at construction project must be operating engineer – Employer not hiring anyone to operate elevator – Whether management rights entitling employer to decide when and whether to employ – Whether duty to employ**

**BEFORE:** Pamela C. Picher, Vice Chairman and Board Members I. Stamp and H. Kobryn.

**APPEARANCES:** *B. Chercover and E. Ford for the applicant; R. A. Werry, B. Foote and P. Vancook for the respondent.*

**DECISION OF THE BOARD;** January 21, 1983

1. The applicant, Local 793 of the International Union of Operating Engineers, has referred to this Board a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement covering the International Union of Operating Engineers, Local 793 and Ellis-Don Limited.
2. Ellis-Don Limited was the general contractor for the construction of a multi-storied addition to the St. Michael's Hospital in Toronto. The project was started sometime in 1981. Up until the end of March of 1982, a manually operated construction hoist was used on the project to lift men and material to the various floors. Consistent with the collective agreement, a member of Local 793 was employed to operate the hoist.
3. This grievance arises, however, because a member of Local 793 was not further employed to operate the elevator that took over the job of lifting workmen and construction materials when, during the normal progression of the project, the construction hoist was dismantled and taken out of service. This occurred at or about the end of March of 1982. When the elevator was put in service and the construction hoist removed, the operating engineer who had run the hoist was laid off. It is common ground that no member of the applicant union was ever employed to operate the elevator from the time it was first put into service through to the point of the Board's hearing on November 1, 1982. Instead, the elevator was run by persons from the various trades as they used it.
4. Counsel for the applicant union argues that the employer's failure to utilize an operating engineer to operate the elevator for the lifting of men and materials from the end of March when it was first put into service until, at least, the date of the Board's hearing in November of 1982 is a breach of article 2.2 of the collective agreement between the parties. Counsel for the employer, on the other hand, maintains that the management rights clause of the collective agreement, article 4, gives the employer the right to decide when and whether to employ someone to operate the elevator in question.



5. The relevant sections of the collective agreement are set out below:

# PROVINCIAL AGREEMENT

BETWEEN:

OPERATING ENGINEERS  
EMPLOYER BARGAINING AGENCY

hereinafter called the "Employer"

- and -

OPERATING ENGINEERS  
EMPLOYEE BARGAINING AGENCY,

hereinafter called the "Union"

• • •

## ARTICLE 2 - RECOGNITION

- 2.1 The employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer [which includes Ellis-Don] and for whom the Union has bargaining rights within the Province of Ontario engaged in work covered by the schedules and classifications set out in this agreement, and any additional classifications as may be agreed to by the parties.

- 2.2 *The onsite operation, repair, maintenance and servicing of all equipment listed in this agreement shall be performed by a member of the Union* including the assembly and dismantling of equipment operated by members of the Union and coming within the jurisdiction of the Union, boom, boom sections and counter-weight installation and removal and any other requirements necessary to put equipment into production or preparation for removal from operations. When Ironworkers are available on site they may be used to assist in the installation and removal of boom, boom sections and counterweight components. Additional assistance by other than Union members for the installation or removal of boom, boom sections and counterweight components shall only be used upon agreement with the Union.

• • •

- 2.5 When equipment covered by this agreement is being moved from place to place under its power only employees covered by this agreement shall be used to move such equipment.

• • •

- 3.4 a) The employer agrees to engage only those sub-contractors and equipment rentals (except equipment dealers) who are in contractual relations with the Union to perform work set out in the classifications of this agreement or as otherwise agreed to by the parties.

• • •

#### ARTICLE 4 – MANAGEMENT RIGHTS

- 4.1 *The Union agrees and acknowledges that the Employer has the exclusive right to manage the business and to exercise such right without restriction, save and except such prerogatives of management as may be specifically modified by the terms and conditions of this Agreement.* Without restricting the generality of the foregoing paragraph, it is the exclusive function of the Employer.

- a) *To determine qualifications, classify, transfer, hire, direct, promote, demote, lay-off, discipline and discharge employees for just cause and to increase and decrease working forces in accordance with the terms of this Agreement.*

• • •

#### ARTICLE 27

The parties agree that Schedules “A” to “O” attached hereto are incorporated into and form part of this Collective Agreement.

• • •

#### SCHEDULE “J”

*This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules “A”, “B”, “C” & “D” hereof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within Metropolitan Toronto, the Regional Municipalities of Peel, York, Durham, the Counties of Simcoe, Muskoka, Victoria, Haliburton, Peterborough and that portion of Northumberland lying West of a line running north from Colborne to McCrackens Landing and that portion of the Regional Municipality of Halton lying East of 25 Highway.*

#### ARTICLE 1 – CLASSIFICATION AND WAGES

- 1.3 *Operators of:* air tuggers used for installation of vessels, tanks, machinery, and for steel erection; side booms on land or water;

*man and material hoist* and single drum hoists 12 stories and under not of a manual friction and brake type; *elevators*, monorails, bullmoose type equipment of t ton capacity or over, air compressor feeding low pressure into air locks, tunnel mole. 3rd class Stationary Engineer.

[emphasis added]

6. Article 2.2 stipulates that the “onsite operation . . . of all equipment listed in this agreement shall be performed by a member of the union”. Article 27 provides that the schedules, including Schedule J, are “incorporated into and form part of [the] Collective Agreement”. Schedule J states that it shall cover and apply to employers engaged in building and construction work in Metropolitan Toronto, such as Ellis-Don on the St. Michael’s construction project. Article 1.3 of Schedule J sets out the wages and classifications for operators of specified equipment. The man and material hoist and elevators are among the listed equipment.

7. Counsel for the union argues that as article 1.3 of Schedule J. lists “elevators” as a piece of equipment, article 2.2 of the Agreement requires that the onsite operation of that elevator be performed by a member of the union.

8. The elevator in question is contained within a bank of several elevators all of which will ultimately be used by the occupants of and visitors to the building. During the relevant period of time, however, the elevator in dispute was the sole elevator in operation. None of the other elevators had been put into service. The evidence further reveals that during the relevant period only persons directly concerned with the construction of the addition used the elevator.

9. There are two modes of operating an elevator. It may be run on “automatic” and controlled from inside or outside by the push of a button, or it may be put on “attendant service”. When it is on attendant service it is operated by a key and may only be controlled from the panel inside the elevator. It will not, in other words, respond to a call initiated on another floor. When an elevator on attendant service reaches the floor of its destination, the doors open and remain open. On automatic service, on the other hand, the elevator doors close automatically some eight to ten seconds after it arrives at the designated floor. When the elevator is on automatic, therefore, the doors must be jammed open to remain open, as might well be required for the delivery of material.

10. At one time the Operating Engineers and the International Union of Elevator Constructors had disagreements over which union was entitled to operate the elevator during construction. Ultimately the two unions resolved the matter by agreeing to share the work on a fifty/fifty basis. Mr. William Shanks a business representative for Local 50 of the Elevator Constructors, visited the Ellis-Don site in early April of 1982, soon after the man and material hoist had been removed and the elevator in dispute put into operation. He stated that the elevator was in “attendant service” with no one in particular designated to operate it. It was available, in other words, for persons from any trade to operate as needed. The evidence reveals that at that point the project was far from finished and substantial material was still being lifted by the elevator. Mr.



Shanks testified that when he returned to the site in May and June he observed further construction material being lifted by the elevator.

11. Mr Robert McCoubrey, the construction foreman on the site for the Otis Elevator Company, confirmed Mr. Shanks' evidence in this regard. He stated that the elevator, from its commencement at or about the end of March of 1982 through to at least the first week of July when he left the project, was used in the same manner as its predecessor, the man and material hoist. It was consistently used to lift workmen and material for the construction project.

12. Mr. Shanks visited the site again in September of 1982. At that time the elevator was in the fully automatic mode and the maintenance panel was locked. He stated that the only people he saw operating the elevator were workmen on the construction project. Moreover, a sign on the front door stated that the location was a construction site and a hard hat project.

13. Mr. Leo A. Palmer is the site superintendent for Ellis-Don. He acknowledged that with the transfer from the man and material hoist to the elevator, the work being done by the elevator was the same as that which had previously been performed with the hoist. Mr. Palmer noted that in April and May the elevator was used on a mixed mode; sometimes it was on automatic service and sometimes it was on attendant service. He stated that sometime in June it was switched to the fully automatic mode. He acknowledged, though, that some damage to the doors occurred while it was being used on automatic. Apparently the doors were jammed open to deliver material and the door detectors broke. Mr. Palmer testified that the regular flow of construction material and workmen up the elevator continued until the last week of October, 1982, just prior to the Board's hearing. He estimated that by the point of the Board's hearing, approximately 92 per cent of the material had been delivered to the various floors. He noted that although they had encountered a delay in delivery, some further few materials would be lifted by the elevator.

14. Mr. Ernest Ford, the business representative for Local 793 of the Operating Engineers, testified to the union's expectation and the general practice with respect to the operation of the elevators following the removal of the man and material hoist on construction sites in Toronto. He stated his opinion that while the words of the collective agreement might indicate that an operating engineer would have to be employed to operate the elevator until the last piece of construction material had been lifted, the practice in the Toronto area has been for the operating engineers to cease their operation of the elevators at some point prior to that. He commented that every project reaches a point in its winding down where there may be some minimal materials left to go up but not enough to justify the employment of a full time operator of the elevator. Mr. Shanks of Local 50 of the Elevators Constructors stated that normally when all construction material has been put into place and the tenants are moving into the building, the union agrees that an attendant is no longer required. He noted that the normal routine would be for the contractor to call the union when all the construction material has been lifted up and for the union to then inspect the project to verify the situation. Mr. Shanks noted that the union does not insist that the last tradesmen be off the site before the elevator operator can be laid off. He stated this view, however, that all the material should be up. Both Mr. Ford and Mr. Shanks stated that they had never

before encountered a situation where the contractor had sought to lay-off the elevator operator at the point when the man and material hoist was removed and the elevator brought into operation, as Ellis Don Limited did in this situation.

15. Counsel for the employer argued that Ellis Don was entitled under the management rights clause of the collective agreement to decline to employ anyone to operate the elevator in question. Counsel submitted that carried to its logical conclusion the interpretation of the collective agreement sought by counsel for the union would require that an operating engineer be employed to operate the elevator until the very end of project. He asserted that that could not possibly be the intention of the collective agreement as both Mr. Ford and Mr. Shanks conceded that it would not be appropriate to require an operating engineer to man the elevator after all the materials had been put in place. When asked for his view of the effect of article 2.2. of the collective agreement, counsel for the employer submitted that if the company chose to utilize someone to operate the elevator, article 2.2 would preclude management from hiring someone from outside the applicant union to do so. He maintained, however, that article 2.2 could not require the company to employ someone to operate the elevator in the first place.

16. Counsel for the union views the matter differently. He maintains that article 2.2 is an aspect of union security that has been negotiated between the parties and requires that the employer utilize an operating engineer to operate the elevator whenever the elevator is operated on the construction project. Counsel maintains that the language of the collective agreement may well be strong enough to require someone from the applicant union to operate the elevator to the very end of the project. He noted though that in its practice the union has recognized that there is a point in the winding down of a construction project when the situation no longer justifies a person operating the elevator on a full-time basis. Counsel argues that clearly that point had not been reached in the facts before this Board and that the employer's failure to utilize an operating engineer to operate the elevator from the end of March of 1982 through to the point of the hearing was a clear violation of the collective agreement. He submits that the testimony from both company and union witnesses establishes that up to the week before the hearing substantial materials were still being lifted by the elevator. He submitted, therefore, that the project had not reached the point where the union's practice would suggest that the union would agree that a union member was no longer required to operate the elevator.

17. The rights of the employer set out in the management rights clause of the collective agreement are by the clear wording of article 4.1 of the agreement, subject to modification by the terms and conditions of the agreement. The Board is satisfied that article 2.2 is a modification of the employer's right to decide when and whether to employ an operator for the elevator.

18. The union has bargained a considerable measure of security into the collective agreement as may be seen, in part, through articles 2.5 and 3.4 of the collective agreement set out above. One further aspect of that security is the article in dispute, article 2.2. In the Board's opinion, article 2.2 establishes the union's right to have all the onsite operation of the equipment listed in the agreement performed by members of the union. Article 27 clearly provides that Schedule J is part of the collective

agreement. Article 1.3 of Schedule J lists various pieces of equipment, one of which is elevators. No one suggested that "elevators" in article 1.3 of Schedule J was not "equipment" within the meaning of article 2.2 of the agreement. Indeed, it would seem difficult to make such an argument. Moreover, no one suggested that "elevators" in article 1.3 of Schedule J did not encompass the elevator in dispute. Instead, counsel for the company argued that the union's right in article 2.2 should be limited to requiring the company to hire a member of the applicant union only if the company first chose to employ an operator to operate the equipment but not if it decided, as in this case, to leave the elevator unattended.

19. Having carefully reviewed the language of the collective agreement, the Board is satisfied that article 2.2 cannot be restricted in the manner suggested by the employer. The article stipulates that the onsite *operation* of the equipment listed in the agreement, i.e. the elevator in dispute, shall be performed by a member of the union. The Board is satisfied that when an elevator moves from one floor to another to lift men and material it is being operated. Accordingly, the Board concludes that when the elevator is so used, that is, when it is moved from one floor to another, the collective agreement requires that it must be operated by a member of the union. Article 2.2 does not say, "When an operator is required for the equipment listed in this agreement, the operation shall be performed by a member of the union". That, however, is the interpretation of article 2.2 that the employer asks us to draw from the existing language of the agreement. In the Board's assessment, to interpret article 2.2 in the manner requested by the employer would be to change the clear words of the collective agreement which is something which this Board, in these circumstances, cannot do.

20. Accordingly, for the reasons set out above, the Board allows the grievance. The Board declares that from the commencement of the operation of the elevator in dispute, at or about the end of March of 1982, until the date of the Board's hearing on November 1, 1982, the employer contravened article 2.2 of the collective agreement by failing to utilize a member of the applicant union for the onsite operation of the elevator in question. It may well be that the circumstances of the project from the point of the hearing onwards would have fallen within that stage of winding down when the union's practice would be to no longer insist that one of its members be employed to operate the elevator. We make no finding, however, in this regard. The Board orders that the employer compensate the union for the losses flowing from the employer's breach of the collective agreement from the point at or about the end of March, 1982, when the elevator was first put into service, through to the end of October, 1982 when substantial material was still being regularly lifted by the elevator.

21. The Board remains seized in the event that a dispute arises over the assessment of the appropriate amount of compensation.

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**1442-82-U George Lazenkas, Complainant, v. United Food & Commercial Workers International Union, Local 1000A, Respondent**

**Duty of Fair Representation – Unfair Labour Practice – Union signing first agreement requiring rotating shifts – Affecting privileges previously enjoyed by complainants – Not referring grievances to arbitration after obtaining legal advice – No violation**

**BEFORE:** Corinne F. Murray, Vice-Chairman.

**APPEARANCES:** *George Lazenkas on his own behalf; Paul Cavalluzzo, Dan Gilbert and Rob Lebi for the respondent.*

**DECISION OF THE BOARD;** January 4, 1983

1. This is a complaint under section 89, alleging a breaching of section 68 of the *Labour Relations Act* filed by George Lazenkas on behalf of himself and ten bartenders at Terminals 1 and 2 at Malton, Ontario. The complaint states:

During the past 6 months the grievors were dealt with by Daniel Gilbert and William Cox – agents of Local 1000A United Food & Commercial Workers Union, Local 1000A contrary to the provisions of section 68 of the *Labour Relations Act* in that they did on their own behalf or on behalf of the respondent: refused to allow me and my co-workers the process of the grievance procedure and arbitration of the collective agreement.

On Schedule A attached thereto, the complainant states:

- (1) The respondent signed a collective agreement that contains letters of understanding which effect my seniority as a bartender and all other senior bartenders employed at Cara Operations Terminals 1 and 2 Malton, Ontario.
- (2) The respondent conducted a vote for the collective agreement between the Cara Operations Terminals 1 and 2 and the United Food and Commercial Workers Union, Local 1000A, whereby all members of Local 1000A employed at Terminals 1 and 2 were allowed to vote for seniority rights of bartenders, which did not effect the seniority rights of the other members of the Union employed at Terminals 1 and 2.
- (3) Daniel Gilbert and William Cox refused to amend these letters of understanding which deny me and co-workers bartenders employed at Terminals 1 and 2 their rights by seniority – choice of shift– choice of days off, which were previously enjoyed by senior bartenders at Terminals 1 and 2 prior to the signing of the collective agreement, therefore, taking away rights which were ours by seniority.

• • •



3. This complaint arises from a change in scheduling shifts. This resulted from the settlement of a first collective agreement between the respondent and Cara Operations Limited (Air Terminals Restaurant Division) (hereinafter referred to as "Cara"). Prior to this settlement the complainant and the other bartenders represented by him enjoyed a fixed schedule of day shifts (10 a.m. – 6 p.m.) and days off. In a letter of understanding entered into between the respondent and Cara, on the same day as the collective agreement, July 8, 1982, Cara agreed

"to rotate bartenders through assigned shifts within each department within each terminal every four (4) weeks ... (and) to rotate the days off of the Bartenders, as well as cooks and sous chef."

This letter of understanding has been included in the booklet entitled "Agreement Full-time" (hereinafter referred to as "Agreement"). This Agreement was the result of numerous negotiating meetings between September 11, 1981 (Notice to Bargain) and May 21 1982 (Memorandum of Agreement).

4. The complainant claimed he did not participate in any aspect of these negotiations until he was advised that the newly negotiated collective agreement required that he, along with all other bartenders employed by Cara, rotate through the shifts. He explained his non-participation as being caused by his belief that he, as a salaried employee, was not in the bargaining unit. In this regard the respondent produced in evidence a certificate issued by this Board dated september 4, 1981, (Exhibit 13) which shows that the bargaining unit description is:

All employees of the respondent, Cara Operations Limited (Air Terminals Restaurant Division), employed at Terminal 1 and Terminal 2 at Toronto International Airport, Malton, Ontario, in its restaurants and lounges, save and except matire d', chefs, supervisors, those above the rank of maitre d', chef and supervisor, office and clerical staff, buyers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

The respondent also produced in evidence two notices of meetings. The first (Exhibit 3) was addressed to "union members" and advised that two meetings were being convened on Tuesday, October 6, 1981, to consider "contract proposals". The second notice produced (Exhibit 6) was addressed to "all bargaining unit members, full-time and part-time" and advised that three meetings were being convened on Sunday, May 30, 1982, to consider ratification of the proposed contract. Both notices were issued by the respondent and posted in the normal course on Cara's premises. The respondent led evidence that the contract proposals, including the one relating to the rotation of shifts, were formulated at an initial meeting of the original core of supporters of the respondent and these proposals were submitted for consideration to those who responded to the notice marked as Exhibit 3. Ultimately, the whole of the settlement including letters of understanding was ratified as a 2:1 vote by those who attended the meeting of May 30, 1982 called by the notice marked as Exhibit 6.

5. According to witnesses called by the respondent, the Negotiation Committee of the respondent felt that the existing shift scheduling was based upon "favouritism"

and not exclusively seniority. It was also the respondent's evidence that until after the ratification meeting of May 30, 1982, there was no contradiction of this view. At the ratification meeting an unidentified person who was presumed to be a bartender by Mr. Daniel Gilbert, President of the respondent, asked whether it was fair that after years of day shift and weekends off he had to rotate. Mr. Gilbert's response was that he was not there to determine "fairness" because the proposal for shift rotation was one that he had received from the membership. Mr. Gilbert testified that the response of a member of the Negotiating Committee to this questioner was "more hostile". After the Memorandum of Agreement was ratified, there were numerous and frequent telephone calls by unidentified bartenders received by the Negotiating Committee of the respondent wherein these bartenders expressed unhappiness with the new schedule. The respondent decided that a meeting of bartenders alone should be convened in order to "let them beef and get it off their chest". This meeting took place on July 23, 1982 at the Howard Johnson's on Dixon Road. Mr. Lazenkas attended, as did between 20 to 30 other bartenders. The meeting was called for 9:30 a.m. and lasted for approximately 1-1/2 hours. Originally the meeting was to commence at 10:00 a.m. but this was changed at Mr. Lazenkas' request. Mr. Lazenkas and others in favour of non-rotating shifts could not remain throughout the whole of the meeting because they were required to report to work. Prior to their departure about half an hour after the meeting began, he and two other bartenders put forward arguments as to why the existing schedule should be retained. Mr. Gilbert responded on behalf of the respondent. Five or six other people present defended the Letter of Understanding. It appears the discussion was very heated between opposing sides. Mr. Barry Grant, Secretary/Treasurer of the respondent, said that at one point he "threw out" the idea of a shift preference being given by seniority. According to Mr. Grant, Mr. Lazenkas did not agree this was a good idea but instead said he wanted to revert to the "old system". Mr. Lazenkas denied saying this. He says his response was "if we go by seniority, we have more seniority - we don't have to work nights - we have enough to go back to day shift". After Mr. Lazenkas and the other bartenders supporting him left the meeting, the discussion continued. After the meeting concluded, approximately 6 to 8 people approached Mr. Gilbert to find out how they could carry their support for rotating shifts further. Mr. Gilbert suggested they provide him with names of those who were in favour of rotating shifts. An undetermined number of days later, a petition (Exhibit 8) composed of two sheets of paper with a total of 10 signatures, came to Mr. Gilbert. At this point Mr. Gilbert did nothing more. Mr. Lazenkas claimed he had never been advised of the petition until the day of this hearing. Mr. Gilbert acknowledged he did not inform Mr. Lazenkas of it because he received his grievance a few days after receiving the petition.

6. By letter dated August 16, 1982, (Exhibit 10) Mr. Lazenkas requested Mr. Gilbert to initiate a grievance claiming that the "undersigned" bartenders were denied:

- (1) (their) seniority rights under the collective agreement in the assigning of work schedules and days off;
- (2) (their) rights under the collective agreement to grieve (their) conditions of work;
- (3) (their) rights at the ratification vote for the current collective agreement, when other employees, members of the Union, were

allowed to vote on the collective agreement and the letter of understanding with regard to (their) conditions of work, whereby (they) are forced to rotate (their) days off work and assigned shifts.

Only Mr. Lazenkas signed this letter notwithstanding the reference to more than one bartender having signed the letter.

7. As a result, three identical grievance were initiated, one by Mr. Lazenkas (Exhibit 1), grieving the first two items listed in Exhibit 10. These grievances were carried through the grievance procedure in the normal course; and after the respondent gave notice to Cara that it would be proceeding to arbitration, it consulted Mr. Martin Levinson for a legal opinion as to the chances of success at such arbitration. Mr. Levinson, prior to rendering his opinion, met with the grievors and considered the provisions of the collective agreement. Based upon this his opinion was that the respondent would have "very little chance" in arbitration, and on this basis the respondent decided not to proceed any further. By letter dated October 29, 1982, (Exhibit 13) Mr. Gilbert forwarded a copy of Mr. Levinson's opinion and advised Mr. Lazenkas of the respondent's decision. Mr. Gilbert suggested in this letter that Mr. Lazenkas and others who were interested in changing the collective agreement should endeavour to propose amendments to the next agreement which would reflect how they wished the shift allocation to occur.

8. There was conflicting evidence given as to how Mr. Lazenkas and other bartenders who had day shifts and certain fixed days off came to enjoy these scheduling arrangements and as to why some in the bargaining unit wished to see the system of scheduling change. The evidence given by Mr. Gilbert and Mr. Grant indicated that they understood from the membership and the Negotiating Committee that the old system was based on favouritism and the change to a rotational basis was seen by them to be necessary to bring about a more equitable situation. It is interesting to note that Mr. Levinson in his legal opinion stated that it was his understanding that the previous system was based on seniority. Mr. Lazenkas disputed both of these versions claiming that the old system operated on the basis of "seniority and classification". He claimed that he has had a schedule of day shifts since he began as "head bartender" 18½ years ago. He did not explain what he meant by this classification and there appears to be no recognition of such a classification either in Appendix "A" to the Agreement or on the seniority lists for Terminals 1 and 2 (Exhibits 14 and 15). The undisputed fact is that several bartenders who were relatively senior (e.g., Theodore Proios, John Soares, Nelson Avelar) did not enjoy the day-shift schedule, while others more junior did (e.g., Peter Goutjoulis, Paul Tamo, Konstantino Tabas). Mr. Lazenkas claimed at the hearing that there was no "favouritism", explaining that Mr. Proios and Mr. Soares had had an opportunity to use their seniority to choose the day shift when a new bar opened up two years ago, but chose to stay in the old bar on a non-day shift schedule. He did not comment on the rationale behind Mr. Avelar's shift schedule.

9. Section 68 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the



representaiton of any of the employees in the unit, whether or not members of the trade unionor of any constituent union of the council of trade unions, as the case may be.

The complaint of Mr. Lazenkas and the others he represents is with respect to two aspects of the respondent's representation rights and duties, i.e.,

- (1) the negotiation of a collective agreement, i.e.,
  - (a) formulation of bargaining proposals;
  - (b) ratification and implementation of the memorandum of understanding;
- (2) the administration of a collective agreement, i.e., grievance handling.

The complaint alleges arbitrariness, discrimination and bad faith in both of these spheres of activity.

10. Insofar as the union's duty under Section 68 in negotiation process is concerned, it has been repeatedly recognized by the Board that "trade-offs" which affect members of the bargaining unit unequally are "the everyday stuff" of collective bargaining, and that in its effort to obtain maximum benefits for its membership a trade union may be forced to make trade-offs which entail the abandonment of the interests of certain individual members. (See *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35; *James Mason*, [1979] OLRB Rep. Feb. 116 and cases cited therein; *Reginald Stanley Harcourt*, [1976] OLRB Rep. Sept. 508.) The fact that a union may be required to make a hard decision between the interests of groups in the bargaining unit therefore does not in and of itself, constitute a violation of section 68 of the Act (see *Dufferin Aggregates*, supra). While considerable deference is given to the union's normal internal procedures, the proof that these procedures have been followed alone will not necessarily be a complete defence (see *Diamond Z*, [1975] OLRB Rep. Oct. 791). Similarly, allegations under section 68 cannot be rebutted simply on the grounds that a settlement was based upon the will of the majority in the unit (see *Dufferin Aggregates*, supra, at pp. 44-45). The interference with "seniority rights" or "job security" especially places a special burden on the majority to explain the rationale behind its choice (see *Dufferin Aggregates*, supra). This Board, in considering allegations of breaches of section 68, must balance the notion that relationship between members of the bargaining unit and the trade union is one of majority control with the fact that the majority could act in an unfair way and tyrannize the minority (see *Ford Motor Co.*, [1973] OLRB Rep. Oct. 519). It was stated at para. 38 of the *Ford* case that section 68 (then section 60):

... is to ensure that individual rights are not abused by the majority of the bargaining unit; it is an attempt to achieve a balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. The duty has been described as the duty of fair representation. The emphasis



is on fairness – it is a duty to act fairly in the interests of all members of the bargaining unit, minority factions, as well as majority factions, individual employees, as well as the collective group, members as well as non-members, craft employees as well as industrial employees. It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected; rather, the statute attempts to have the union consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision.

The purpose behind section 68 (then section 60) of the Act was aptly summarized in the *Canadian Union of Public Employees Local 1000 – Ontario Hydro Employees Union* case, [1975] OLRB Rep. May 444 at p. 460:

Section 60 reflects one of the great paradoxes in industrial relations. As legislatures of modern industrial jurisdictions have come to sanction collective action to protect individual employees from all-powerful employers, a second need has arisen to protect individual employees from all-powerful employers, a second need has arisen to protect individuals from the collective so sanctioned to act on their behalf.

And at p. 462:

Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment. This aspect of the duty is particularly important in discouraging discrimination on the basis of race, creed, colour, sex, etc., preventing internal trade union politics from erupting into forms of invidious conduct; and in prohibiting extreme forms of interpersonal breakdowns within a trade union. It is basic to a system based upon an exclusive bargaining agent. But as important as this subjective ill-will aspect of the duty is and as difficult as it may be to apply in some circumstances the most vexing and difficult application of the duty today as in giving meaning to the word “arbitrary”.

“Arbitrariness” has been variously translated to mean “unresponsiveness” (*John Bourgeois*, [1972] OLRB Rep. July 709), “perfunctory” (*I.W.A. Local 2-700*, [1972] OLRB Rep. Oct. 916; *Diamond Z*, supra) or totally ignoring the merits of the position of an individual or group (*I.W.A. Local 2-700*, supra). Conversely, in order to show no violation of section 68 has occurred, a union must show that it has addressed its mind to the circumstances of those who may be adversely affected by its decision (see *Dufferin Aggregates*, supra). This is applicable even when the union is receiving its mandate for negotiations and is acting as a forum for resolving conflict between sometimes irreconcilable employee interests.

11. The applicant, therefore, in the aspect of his case alleging employer conduct in the negotiation process, has the onus of showing that the will of the majority of

those attending and voting at the meetings formulating bargaining proposals and ratifying a concluded memorandum of settlement had no objective justification. The Board has found that the applicant has failed to discharge that onus. The contract proposals were prepared on the belief that the system of scheduling was based on "favouritism". Without a countervailing view being expressed at a meeting called for the purpose of finalizing contract proposals or expressed at any other time prior to ratification, the respondent is not under any obligation to check on the accuracy of this belief. There also was no evidence that Cara disputed this belief at any time. It therefore would be natural that the belief would be considered reliable. The question put by an unidentified bartender at the ratification meeting would not cause even the most scrupulous listener to conclude that this perception of how scheduling had occurred in the past was thereby being challenged. While Mr. Gilbert's response to this person may indicate a lack of a full appreciation of what the dimensions of his duty under section 68 are, it does not constitute a violation in these circumstances. Faced with a desire by the membership and those on the Negotiating Committee that a system based on favouritism be changed to a more equitable basis, the bargaining demand was that everyone rotate. The Board finds nothing violating section 68 in this. The attractiveness of a union to employees often arises out of a desire to put their working conditions on a more equitable or systematic basis. In this instance the change in scheduling would have been in either of two ways – a system based on seniority or one with rotating shifts. The participants in the negotiation process, with one exception, felt rotating shifts was what they wanted for bartenders, cooks and the sous chef to rectify what they perceived to be an inequitable system. They achieved this through negotiations. Subsequent to the memorandum of agreement being ratified, there was a full discussion by bartenders only regarding the rotating of shifts and the respondent attempted to listen to the points and consider alternatives. A suggestion was made by Mr. Grant that perhaps the shift scheduling could be based on seniority. There is a conflict between Mr. Lazenkas and Mr. Grant as to what Mr. Lazenkas' response to this was. The Board accepts as more credible Mr. Grant's evidence because Mr. Lazenkas' rendition of his response did not make sense. It did not coincide with the fact that some more senior junior people were enjoying day shifts when some more senior people were not, and it did not coincide with Mr. Lazenkas' own description of the old system being based on "seniority and classification". If indeed seniority and classification (a term never explained) was the old system and the inclusion of classification was a factor missing from Mr. Grant's suggestion, one would have expected Mr. Lazenkas to devote some of his response to that aspect. In view of this, it is more likely Mr. Lazenkas stated he wanted to return to the "old system". In view of this, Mr. Lazenkas has failed to show that the formulation of the bargaining proposal for changing the shift scheduling to a rotational basis was not based on any objective justification.

12. The evidence was clear and undisputed that the union followed its usual ratification process, giving notice to the bargaining unit in the normal course and relying on the majority vote of those present. The bargaining unit consisted of bartenders, among others, at both Terminals 1 and 2, and it is not improper in any way to have all the members in the unit vote on the totality of proposals.

13. Even if the response of Mr. Gilbert to the bartender who questioned the fairness of the proposed changes to shift scheduling could be considered "Unresponsive" or "perfunctory" (which, in the circumstances, we have found it not to be), the results of it were cured by the meeting of July 23, 1982 for bartenders alone. There

appears to have been a full vetting of positions at this meeting and the subsequent petition by 19 of the bartenders showed that the original position adopted by the membership was supported by a majority of the members who were bartenders. While Mr. Lazenkas should have been given the petition, or at least informed of its existence and the respondent's reaction thereto explained to him, this failure in these circumstances does not constitute a violation of the Act.

14. Turning to the handling of the grievances lodged by Mr. Lazenkas and two other bartenders, the Board finds that section 68 has not been violated because there is evidence that the union fairly put its mind to the merits of the grievances in deciding against arbitration. Acting in accordance with its usual practice, the union submitted the grievance to its legal counsel, and, based upon this advice, decided not to pursue the grievance to arbitration. It has been recognized by the Board on previous occasions that this type of consultation can resolve in the union's favour any allegation of breach of section 68 insofar as the processing of grievances is concerned (see *Francon Division* [1973] OLRB Rep. Nov. 556; *Wakefield Harper*, [1978] OLRB Rep. July 640; *Toronto East General & Orthopaedic Hospital*, [1980] OLRB Rep. April 555).

15. For all of these reasons the complaint is hereby dismissed.

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**0988-82-U** Ontario Nurses' Association, Jean Berger and Carol Lindsay, Complainants, v. **Grey Owen Sound Joint Homes for the Aged** (Grey-Owen Lodge), Respondent

**Duty to Bargain in Good Faith – Practice and Procedure – Unfair Labour Practice – Allegation of delay in disclosure of material information at negotiations – No violation where information given in time to allow other side to respond – No general Board policy to refuse to hear bad faith bargaining complaints where agreement signed before hearing**

**BEFORE:** G. Gail Brent, Vice-Chairman and Board Members J. A. Ronson and C. A. Ballentine.

**APPEARANCES:** *Richard Nixon, Philomena Frisina, Ella Johnson, Jean Berger and Carol Lindsay for the complainants; R. C. Filion, H. L. Van Wyck, Q.C., R. G. Butcher and C. Peterson for the respondent.*

**DECISION OF THE BOARD;** January 20, 1983

1. The following chronology of events is essential to the understanding of this matter:

- (a) On January 20, 1981 the complainant association was certified as bargaining agent for registered nurses employed by the respondent.



- (b) Between January 20, 1981 and January 4, 1982 there were negotiations between the parties; however, these negotiations did not result in a collective agreement.
- (c) On January 4, 1982, the complainant association served notice on the respondent to submit all outstanding issues to arbitration pursuant to the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1980 c. 205.
- (d) On August 18, 1982 the complainant association filed its original complaint against the respondent. This complaint did not allege any violation of section 15 of the Act.
- (e) On September 27, 1982 a hearing was convened to hear and determine the complaint. The complainant association amended its original complaint to include an allegation of bad faith bargaining. There was a request for particulars to be filed and submissions were requested on the matter of who would proceed first. The hearing adjourned.
- (f) On September 29, 1982 representatives of the complainant association and the respondent met and resolved all outstanding issues. A memorandum of agreement was signed that day.
- (g) On October 6, 1982 the collective agreement was ratified and it was signed on November 3, 1982.
- (h) On November 18, 1982 the Board convened a hearing to deal with the complaint.

2. In the period between September 27, 1982 and November 18, 1982 counsel for the complainants filed particulars setting out the facts which were being relied on in connection with the section 15 complaint. Counsel for the respondent, being unaware of the memorandum of settlement, had also informed the Board that the respondent would be prepared to proceed first and adduce all of its evidence.

3. When the hearing convened on November 18th, the Board was informed for the first time about the existence of the collective agreement. Having regard to the fact of the collective agreement and the particulars filed by the complainants, the Board questioned counsel about the appropriateness of proceeding to hear the allegations of the breach of section 15. Counsel for the complainants informed the Board that in view of the collective agreement, the complainants were only seeking a declaration to the effect that the respondent had bargained in bad faith during the course of the negotiations. Counsel for the respondent asked to have the allegation concerning section 15 struck out.

4. The Board then invited counsel for the parties to make written submissions on whether the issues raised by the complaint were moot or whether they should be heard.

5. The particulars upon which the complainants would rely are set out in a letter from counsel for the complainants dated November 1, 1982. They are set out in full below:

First, it is apparent from a cursory review of the Reply filed by the Respondent that the Respondent knew prior to May of 1981 that the role of Grey Owen Lodge Home for the Aged was under review by the Ministry of Community and Social Services. The Complainants further submit that the Respondent knew as early as November of 1981 that the Ministry had decided that the role of Grey Owen Lodge Home for the Aged would be changed and that the Respondent knew, or should have known, that the positions of the Association's members could be adversely affected. Nevertheless, it was not until after April 22, 1982 that the Association was advised by Mr. Harold L. Van Wyck "of the changing role of Grey Owen Lodge" which he warned would lead to a "major reduction in staff". Furthermore, the Association's negotiating committee was not advised by the Respondent's negotiating committee until June 8, 1982 of the Ministry's involvement at Grey Owen Lodge Home for the Aged and, more importantly, of the adverse affects of the Ministry's involvement on the positions of the Association's members. The Complainants submit that the Respondent owed a duty under Section 15 of the Act to reveal forthwith to the Complainants on its own initiative the involvement of the Ministry at Grey Owen Lodge Home for the Aged, the decision of the Ministry to change the role of Grey Owen Lodge Home for the Aged, and the Respondent's decision to reduce the number of positions held by the Association's members.

Second, Grey Owen Lodge Home for the Aged is one of two facilities operated by the Respondent. The Complainants submit that by November of 1981, the Respondent had decided to construct a third home for the aged in Durham, Ontario. The Complainants submit that one of the reasons why the Respondent decided to construct a home for the aged in Durham, Ontario was to have a union free facility to which residents from Grey Owen Lodge Home for the Aged would eventually be transferred. At no time was the Association's negotiating committee advised by the Respondent of the Respondent's decision to construct a home for the aged in Durham, Ontario. The Complainants submit that the Respondent owed a duty under Section 15 of the Act to reveal forthwith to the Association on its own initiative its decision to construct a third home for the aged in Durham, Ontario.

Third, the Complainants have learned that one of the reasons why the Respondent decided to transfer certain patients from Grey Owen Lodge Home for the Aged was as a result of the Respondent's decision to effect certain renovations to Grey Owen Lodge Home

for the Aged. The Complainants were not immediately advised of the Respondent's decision to effect the said renovations. As a consequence, the Complainants were denied the opportunity to discuss in a meaningful way the implications in terms of patient care of the said renovations with the Respondent. The Complainants submit that the Respondent owed a duty under Section 15 of the Act to reveal forthwith on its own initiative its decision to effect certain renovations to Grey Owen Lodge Home for the Aged and to discuss in an open and frank manner ways in which the said renovations could be effected with a view to minimizing the effects on patient care, eliminating any need to transfer any patients from Grey Owen Lodge Home for the Aged, and preserving the positions of the Association's members.

Finally, the Complainants submit that one of the reasons why the Respondent decided to transfer its extended care residents as opposed to certain other residents from Grey Owen Lodge Home for the Aged was to provide an excuse to eliminate some of the positions held by the Association's members. In the alternative, the Complainants submit that the transfer of the extended care residents from Grey Owen Lodge Home for the Aged need not have resulted in the elimination of all of the positions held by the Association's members. The Complainants were not immediately advised of the Respondent's decision to transfer extended care residents from Grey Owen Lodge Home for the Aged, thereby denying the Complainants the opportunity to discuss the implications in terms of staffing requirements at Grey Owen Lodge Home for the Aged of the said transfer with the Respondent. The Complainants submit that the Respondent owed a duty under Section 15 of the Act to reveal forthwith on its own initiative its decision to transfer residents from Grey Owen Lodge Home for the Aged and to discuss in an open and frank manner ways in which the said transfer could have been implemented so that the positions held by the Association's members would not have been affected.

6. The particulars make it clear that by June 8, 1982 the complainant association was in possession of all of the information upon which it would rely as having given rise to a duty to inform on the part of the respondent. This was at least three and one half months before the memorandum of agreement was signed. There are no allegations to the effect that there was any information which should have been disclosed but was kept from the complainant association after June 8, 1982 and before September 18, 1982, therefore the only conclusion that one can draw from the complaint and its accompanying particulars is that the complainant association knew everything it alleges it ought to have known long before the bargain was struck. It therefore must be concluded that it had ample notice to enable it to re-assess its bargaining positions in view of the respondent's disclosures.

7. The Board has never declined jurisdiction to hear complaints alleging a violation of section 15 simply because the parties have entered into a collective



agreement. The only case cited to us where the collective agreement was entered into between the date the complaint was filed and the hearing was *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421. That case is of no real assistance in setting out any guidelines because the section 15 aspect of it was dealt with on the issue of the status of the complainants to bring such a complaint. At paragraph 27, the Board said that a group of employees lacked the status to bring such a complaint, and it can be concluded from that, that had the section 15 allegations been treated as a separate issue, as is the case here, the Board would have dealt with it as a question of jurisdiction and dismissed it.

8. In every other case cited by counsel, the Board was asked to determine whether there was a section 15 violation in the face of allegations to the effect that a trade union had been “kept in the dark” about a decision until after a collective agreement had been signed. The complaints were that bargaining in good faith could not take place when one party is misrepresenting certain material facts and so deprives the other party of its ability to bargain with full knowledge of all material facts. Such were the allegations made in *Westinghouse Canada Limited*, [1980] OLRB Rep. August 577 and *Amoco Fabrics Ltd.* [1982] OLRB Rep. Mar. 314. In both cases the complaints were against being kept in ignorance of a particular decision until after the collective agreement had been signed.

9. In this case there is no such allegation concerning the conduct of bargaining. There was no agreement consummated while the complainants were ignorant. In this case the section 15 violation was not alleged until approximately one month after the complaint was filed and approximately three and one half months after the disclosures were made. Moreover, knowing everything it alleges it should have known, the complainant association then freely entered into a collective agreement with the respondent. This was done rather than waiting to appear before an interest arbitration panel before which the complainant association could have made out its case for any appropriate contractual language to meet the fact situation with which it was confronted. It is difficult to determine where the complainant association was harmed by any failure to disclose earlier, and it is difficult to interpret the complaint as anything other than a complaint that information should have been conveyed earlier in the process.

10. In our view, the Board has interpreted section 15 in such a way that complaints made after a collective agreement has been entered into are heard but, to hope to succeed, must show for a start, that the trade union was materially affected by a misrepresentation so as to deprive it of the opportunity of responding to the new state of affairs. It is our view that there would be no breach of section 15 shown on the face of the complaint where there was no failure to disclose and/or where the trade union was not deprived of any opportunity to respond to the true state of affairs in the collective bargaining process. Where the complaint, as particularized, does not disclose a breach of the Act then we can decline to hear it. It is our view that we should do so here.

11. In its written submissions the complainant association sets out policy considerations which it says should move us to hear the matter. With respect, the essence of the complaint as originally filed, deals with allegations of anti-union behaviour on the

part of the respondent. These matters are still before the Board in their entirety, and represent the substantial issues in the dispute between the parties. It would, in our view, be counter-productive to lose sight of these real issues by dealing with a matter which the parties have dealt with through disclosure and bargaining following that disclosure. It is not the function of this Board to police bargaining so closely, that it will dictate to parties when in the course of bargaining to disclose material facts before consummating bargains. So long as the disclosure is made in time to give the other party the opportunity to respond, then they are in a position to determine their fate and make the best bargain they can. To penalize those who disclose could have the effect of discouraging disclosure, and that would be a result which this Board would not want to encourage.

12. It is our view that to refuse to hear this complaint would be neither unfair nor a windfall to the respondent. The respondent faces serious complaints which on their face do allege that the Act may have been violated. It would serve no useful purpose to proceed to deal with one which shows no such thing simply because the complaint has been articulated. The section 15 complaint was added to the original complaint almost, it would seem, as an afterthought; however, at the time it was not articulated so that the Board could judge whether on its face it disclosed a violation of the Act. Now that we have the particulars upon which the complaint was made we can determine whether we should hear it, and it is our decision that we should not.

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**0745-81-R** Labourers' International Union of North America, Local 183, Applicant, v. **Heart Construction Co. Ltd.**, Respondent, v. United Brotherhood of Carpenters and Joiners of America Local 1190, Intervener

Evidence – Practice and Procedure – Reconsideration – Witness – Person issued *subpoena duces tecum* producing documents at Board hearing – Party seeking to prove documents through hand-writing expert without calling person producing as witness – Practice permissible – Prior oral ruling to contrary revoked

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** *J. Sack, Q.C. and C. M. Mitchell for the applicant; no one appearing for the respondent; David A. McKee and James Tobin for the intervener.*

**DECISION OF THE BOARD;** January 27, 1983

1. The Labourers' International Union of North America, Local 183 ("Local 183") has made allegations of improper or irregular conduct with respect to certain alleged conduct which was attributed to the United Brotherhood of Carpenters and Joiners of America, Local 1190 ("Local 1190"), the respondent and the Ontario Carpentry Contractors Association ("OCCA"). In the course of adducing evidence with respect to its allegations, Local 183 served a subpoena on Mauro Angeloni, the

secretary of the OCCA. This subpoena was in the form of a *subpoena duces tecum* and required Mr. Angeloni to bring with him certain documents which were believed to be in his custody. After certain delays, Mr. Angeloni agreed to appear before the Board and agreed that the previous *subpoenas duces tecum* that had been served on him by Local 183 were binding in respect of his appearance before the Board. He further agreed to produce all of the required documents before the Board.

2. At the hearing, Local 183 was permitted to inspect the documents which were in the custody of Mr. Angeloni. Local 183 then sought to prove certain of these documents and compare the handwriting on documents which were previously in evidence before the Board. In this way Local 183 sought to avoid calling Mr. Angeloni, as a witness with the result that Local 1190 would not be given the opportunity to cross-examine Mr. Angeloni (who was perceived by Local 183 as being allied in interest with Local 1190). Mr. Angeloni and Local 1190 opposed this method of proving the documents and the Board after hearing brief argument ruled orally that the documents in question were to be proved through the calling of Mr. Angeloni as a witness.

3. Subsequently, Local 183 asked the Board to reconsider its decision. The Board entertained this request and more detailed and elaborate argument was addressed to the Board.

4. A *subpoena duces tecum* has been defined in *Black's Law Dictionary* as follows:

A process by which the court, at the instances of a suitor, commands a witness who has in his possession or control some document or paper that is pertinent to the issues of a pending controversy, to produce it at the trial.

There is no issue before the Board concerning its authority to issue a *subpoena duces tecum*. The nature and scope of the *subpoena duces tecum* is derived from a number of nineteenth century English cases. One of the earliest cases to deal with this point was *Davis v. Dale* (1830) 172 E.R. 729, where it became necessary to give in evidence certain written agreements. The agent who held them was served with a *subpoena duces tecum* and was subsequently called upon by the plaintiff to produce the documents without being sworn as a witness in the cause. The defendant argued that the course pursued by the party calling such a person assumed that he was in possession of the papers required, which assumption, it was claimed, the plaintiff had no right to make. The defendant also argued that the only way to ascertain this fact was for the question to be put to the agent, and the putting of the question would clearly render the agent as a witness, and entitle the other side to cross-examine. The court, through Lord Chief Justice Tindal, expressed the view that a person having custody of papers and being subpoenaed to produce them on the trial of a cause, may be called on to put them in without being sworn. Accordingly, the agent was not sworn and the defendant was not given an opportunity to cross-examine.

5. A few years later, support was expressed for the proposition that the *subpoena duces tecum* has two separate aspects in the comments of Parke, J. in *Perry v. Gibson* (1834) 110 E.R. 1125, 1126, where he stated:



I always thought that a *subpoena duces tecum* had two distinct objects and that one might be enforced without the other.

Parke, J. made reference to the *ad testificandum* and the *duces tecum* aspects of the subpoena, with the first requiring attendance for the purpose of giving oral testimony and the latter requiring the person to attend and produce the documents which had been referred to. This point was further elucidated in the same year in *Summers v. Moseley* (1834) 149 E.R. 849, where Bayley, B. indicated that it does not follow that because a person is called upon to produce a document or documents that he must be called upon to give oral evidence. At page 853, he stated as follows:

That question which was very important as a rule of evidence, was, whether a bailiff having been called by the plaintiff to produce the warrant from the sheriff under which he had acted, had a right to insist upon being sworn in the ordinary form as a witness, so as to give the defendant an opportunity of cross-examining him, or whether the plaintiff in the cause had a right to insist upon the production of the warrant without the bailiff being sworn. Several cases were cited upon the argument as having been decided in conformity with the rule as contended for on behalf of the plaintiff, but they were all cases at *Nisi Prius*, and as the question is one of great importance and frequent occurrence, and it is highly desirable that the rule of evidence should be fixed, we were desirous of having an opportunity of communicating on the subject with the Judges of the other courts before we delivered our judgment. We have accordingly had a communication with the other Judges, and the result is, that we are of opinion that the cases ruled at *Nisi Prius*, and relied upon on behalf of the plaintiff, were rightly ruled, and that the officer is compellable to produce the document in his possession without being sworn, the party calling him to produce it not having occasion to ask him any question.

6. More recently in *Tribune Newspaper Company Limited v. Fort Frances Pulp and Paper Company Limited* (1932) 40 Man. R. 401, 409, Ronson, J. A. stated:

There is no need to elaborate the fact that a person subpoenaed in this way [*subpoena duces tecum*] may be called on to produce documents without being sworn, or he may be sworn and then submit to examination as to the existence, whereabouts or control of the documents.

Similarly, in *Cross on Evidence*, 4th Edition, the following comment appears:

Someone who simply produces a document pursuant to a *subpoena duces tecum* does not have to be sworn if there is another witness who can identify the document. This means that the person producing it cannot be cross-examined.

7. In Canadian texts, *Holmstead and Gale* states at page 1429 as follows:

The two phases of testimony, personal and documentary are deemed to be separate, and the summoning party is entitled to require the witness to produce the document, without putting him on the witness stand to speak as to his general knowledge of the case.

The practice of having a document produced without swearing the witness is known as calling a witness on his subpoena and in *The Law of Evidence in Civil Cases* (1974), Sopinka and Lederman at page 499 refer to *Lyone v. Long* [1917] 3 W.W.R. 139, which case set forth a number of situations in which "witnesses" were not subject to cross-examination. One example of this exemption was:

A witness called merely to produce a document where the document requires no proof or is to be proved by other means.

8. For the foregoing reasons, the Board reconsiders and revokes its previous oral ruling in this matter. Local 183 may endeavour to prove the documents in Mr. Angeloni's custody through the forensic expert without the necessity of calling Mr. Angeloni as a witness.

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**1553-82-M** Messaouda Danielle Boulakia, Applicant, v. **Hillel Academy Teachers' Association**, Respondent Trade Union, v. **Ottawa Talmud Torah**, Respondent Employer.

**Religious Exemption – Applicant teacher at Jewish Community School – Initially supporting union – Concern about effect of work stoppages on Jewish community – Beliefs sincere but not rooted in religion**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members I. Stamp and P. J. O'Keeffe.

**APPEARANCES:** *M. Danielle Boulakia in person; John B. West for the respondent trade union; no one for the respondent employer.*

**DECISION OF THE BOARD;** January 19, 1983

1. This is an application for religious exemption made pursuant to the provisions of section 47 of the *Labour Relations Act*. That section reads as follows:

47.-(1) Where the Board is satisfied that an employee *because of his religious conviction or belief*,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

The Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and only during the life of such collective agreement, and does not apply to employees whose employment commences after the entering into of the collective agreement.

No objection is taken to the timeliness of this application. The applicant asserts that because of her religious convictions or beliefs, she is unable to be a member of the respondent union or pay the dues prescribed by Article 11 of the current collective agreement between the union and the School.

2. A hearing in this matter was conducted in Ottawa on December 16, 1982. All parties were given the opportunity to lead evidence and make submissions. No one appeared on behalf of the respondent employer. For ease of reference, the two respondents will be referred to simply as "the union", and "the employer" or "School".

3. The applicant is a part-time teacher at the Hillel Academy run by the Talmud Torah Board. These are non-profit organizations, having as their objects the advancement of religious, cultural, linguistic, and secular education for Jewish youth in the Ottawa/Hull region. The School has various divisions and employs approximately thirty-nine teachers. Thirty of them are Jewish. The applicant has worked for the School for about four years.

4. The union was certified to represent the teachers at the School on June 19, 1981. The applicant supported that application for certification. On May 19, 1981, she voluntarily applied for membership in the union. Her application for membership, along with that of other employees, formed the basis for the Board's decision to certify the union. Her application was accompanied by an immediate payment of five dollars, and specified that thereafter, there would be a monthly membership fee of fifteen dollars payable on the first day of each teaching month. Indeed, through a travel agency in which she has an interest, Ms. Boulakia made the travel arrangements for the union representatives who appeared at the certification hearing in Toronto. Initially, at least, the applicant did not oppose the trade union or collective bargaining, nor did she consider that process antithetical to her own interests or the relationship between the



school, the teachers, and the community. Nor does the union or the employer. Article 1 of the collective agreement provides, in part:

The parties share a desire to improve the quality of education and services to the students and to meet community interest. For this purpose and in order to promote harmonious and mutually beneficial relationships between the Board and [the union], the parties hereby set forth certain terms and conditions of employment. . . .

In view of the desire of the parties to maintain harmonious relationships and to provide the highest quality of educational service, the parties agree that there shall be no strike or lock-out during the term of this Agreement. . . .

5. After the certification of the union, the applicant attended a number of meetings and, for some months, continued to pay the specified monthly dues. Unfortunately, negotiations with the employer were not proceeding as smoothly as expected, and the applicant became concerned about the potential ramifications for the School and the community – particularly when her colleagues began to contemplate the possibility of a work stoppage. Over a period of time before there were three strike votes conducted. In each case, Ms. Boulakia, along with five or six other teachers, voted against going on strike.

6. Ironically, it was not the union which initiated a work stoppage. In May, 1981, the School authorities imposed a lockout, and the teachers were ultimately off work for two or three days. During that work stoppage the applicant did not engage in picketing but rather did “alternative duty” on the telephones at the home of one of the union officials. Ultimately, however, the work stoppage was short, the differences between the parties was resolved, and a collective agreement was concluded. The agreement was ratified by the employees in a secret ballot vote in which Ms. Boulakia took part.

7. The evidence strongly suggests that had there not been a collective bargaining impasse culminating in a work stoppage, Ms. Boulakia would not have made this application. But as time passed she became deeply concerned about the relationship between the teachers and parents in the community. Many of those parents were her friends, and strongly disapproved of the potential disruption of the School attributed to the union’s collective bargaining efforts. Ms. Boulakia told the Board that there was a change of atmosphere which prompted pangs of conscience and a reconsideration of her original support for the union.

8. Ms. Boulakia testified that, for some time, she had been torn between sentiments of solidarity which she felt for her fellow teachers, and her growing concern that the process of collective bargaining was undermining the role of the School in the community and the amicable relationships which had existed before. Nor was Ms. Boulakia alone in this view. Several of her colleagues were also opposed to resort to a strike, and so indicated in the several strike votes which the union

conducted. The difficulty for the Board is to distinguish Ms. Boulakia's opposition, which she asserts is based on religious grounds, from that of her colleagues and (for the most part) co-religionists, most of whom supported the union and the strike, and some of whom, like Ms. Boulakia herself, were concerned about the potential affects of the work stoppage. Of those opposed only Ms. Boulakia asserts her opposition on religious grounds. Moreover, we note once again the irony that it was the community representatives on the School Board who initiated a lockout, even though, presumably, they too were concerned about the disruption a work stoppage might cause.

9. There is nothing in Jewish teaching or tradition which, in a general sense, prevents support for a trade union. Historically, Jews have played an important role in the development of the labour movement both in Europe and North America, and, in Israel, the Jewish labour movement (Histadrut) is an important national force. Teachers in Israel are unionized and are part of Histadrut. Indeed, Ms. Boulakia testified that she was not opposed to trade unions per se. She said that if she were working in the civil service or an ordinary secular school she would have no difficulty in supporting a union or strike action. She would not be concerned with the interruption of services to the general community or even the interruption of children's education. It was the unique functions of *this School*, and its special relationship with the Jewish community which prompted her concern. Likewise, she was not opposed to the respondent union per se – only her own participation in it. In her submission, her colleagues should be free to express their views in this regard. Her opposition was personal. Others would (and clearly do) have a different view. Ms. Vardi, for example, who teaches Jewish religion, law, custom and prayer, does not find her support for the union incompatible with her religious beliefs.

10. It was evident that the applicant's concerns are sincere, but it is much more difficult to discern how they are rooted in religious belief. When asked this question specifically, Ms. Boulakia was unable to provide an answer. She was not being evasive or unresponsive. She simply had difficulty articulating the basis for her opposition other than as follows: she was Jewish, she was teaching in a Jewish school, the School performed important social, educational, cultural and religious functions in the community, education itself is an asset which Jews particularly value, and the activities of the union led to an interruption of the School's activities and dissension in the Jewish community. This is the basis for the "pangs of conscience" to which she referred in her evidence.

11. Ms. Boulakia does not uniformly follow the traditions associated with Orthodox Jewry, nor was she familiar with any Jewish principles or precepts which would support her current position. She said that it was not founded upon her reading of the Bible or other religious texts, nor from the teaching of, or her discussions with, Rabbis. Nor could she identify anything in her education, background, or tradition which provided a religious foundation for her current position – other than, as she pointed out, the importance of education and the School as a vehicle for inculcating religious and cultural values. But, as we have already noted, the acceptance of these general principles has not prevented her fellow teachers from engaging in trade union activity, nor the School authorities from imposing a lockout. Can it be said, then, that Ms. Boulakia's opposition to certain activities of the union or the consequences of collective bargaining, however sincere it might be, is grounded upon religious

principles – as opposed to a simple concern about the potential consequences of a work stoppage which she shares with other members of the community, and which they have communicated to her? Are her “pangs of conscience”, however genuine, sufficient to trigger section 47, which refers not to a “conscientious objection” but to “religious conviction or belief”? Is it sufficient to simply assert that her opposition is based upon religious belief, when the religion to which she adheres – Judaism – does not prohibit trade union activity, and she cannot identify or articulate a religious underpinning for her position? The question is a perplexing one.

12. The Board’s approach to the interpretation of section 47 has been recently reviewed in *York University Re Douglas N. Butler* [1981] OLRB Rep. Sept. 1319. It is unnecessary to repeat that analysis here. It suffices to say that section 47 casts upon the Board the unenviable task of determining whether an individual’s views are “religious” and whether they are the cause of his objection to the union. The Legislature might have framed the exemption more broadly – referring perhaps to “conscientious objection” or “sincerely held personal belief” – but the words which it used are “religious conviction or belief”. And, as the Board indicated in *Butler*, not all sincerely held personal beliefs are “religious”, and there will often be real difficulty in distinguishing “religious beliefs”, “personal convictions”, “matters of conscience”, “social values”, “standards of ethical conduct”, etc., all of which may be intertwined in particular cases. (See also: *Donald v. Hamilton Board of Education*, (1945) 3 D.L.R. 424; *Adelaide Company of Jehova’s Witnesses Inc. v. The Commonwealth*, (1943) 67 C.L.R. 122 at pages 123–124; *The Civil Service Association of Ontario (Inc.) v. Anderson*, (1976) 9 O.R. (2d) 341; and *Trenton Construction Workers Association, Local 52 v. Tange Company Limited*, (1963) 63 CLLC ¶15,459.) Moreover, even if someone holds beliefs which are unquestionably “religious” (clearly involving or stemming from some conception of God or the Divine), it does not follow that his views on secular subjects – politics, economics, collective bargaining – are religious beliefs, or spring from religious beliefs. The Board’s task under section 47 is fraught with difficult and delicate problems of definition, characterization and causation.

13. It has long been held by this Board that to qualify for exemption an applicant need not be a member of a particular religious sect which espouses as part of its doctrine opposition to trade unions. The Board is concerned not with religious orthodoxy, but rather with the personal religious beliefs of the applicant. Accordingly, the fact that Judaism espouses no prohibition against unions or strikes is not fatal to the applicant’s case. However, she still must satisfy the Board that her opposition is based upon religious conviction or belief.

14. In many situations a person of strong beliefs may find difficulty in tracing the source of those beliefs. That is understandable. If one gives any weight to the theory that a person is the product of his upbringing and environment, then clearly a religious person, raised in a religious environment, will tend to attribute the existence of a great many beliefs about the way the World ought to be to his religious convictions or beliefs. But that does not mean that all of his beliefs on social, economic, or political questions are “religious”, nor do we suggest that such person is in any way trying to mislead the Board when they are so characterized. It is only that the individual may have lost a sense of objectivity when scrutinizing his beliefs and (like the Board) have difficulty establishing a clear connection between opinions on social, political, or



economic questions (here collective bargaining), and religious principles. Under the Act, however, an applicant must not only be able to convince himself that religious beliefs are the cause of his objection to paying dues, he must also be able to convince the Board of the same thing.

15. In the case at hand, there is no doubt that the applicant has a sincere concern about the consequences of some of the activity in which her union has engaged, and, upon reflection, has decided that those consequences are undesirable in the special circumstances of a Jewish community school. No doubt those views are shared by other teachers and supporters of the School, and, indeed, are not unlike those expressed by many citizens in small communities faced by the potential disruption of a teachers' strike. However, on the basis of the evidence before us, we cannot find that the applicant's opposition to the trade union is traceable to, or because of, her religious convictions or beliefs.

16. The application is therefore dismissed.

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# **1742-82-R Jean Marc Joanisse, Applicant, v. The Retail, Wholesale and Department Store Union, AFL:CIO:CLC: and its Local 414, Respondent**

**Petition - Termination - Owner's son employed by company - Son soliciting opposition to union and circulating petition - Petition held not voluntary in circumstances**

**BEFORE:** Corinne F. Murray, Vice-Chairman, and Board Members W. G. Donnelly and H. Kobryn.

**APPEARANCES:** *Stephen T. Carlo and Richard Makuch for the applicant; James Donnelly and Buddy Fischer for the respondent.*

## **DECISION OF THE BOARD; January 27, 1983**

1. This is an application pursuant to section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining units defined in the collective agreement which terminated December 31, 1982, namely:

### ***FULL-TIME UNIT:***

All employees of Jean-Marc Lalonde Limited, carrying on business as Marché Lalonde at Alfred, Ontario, save and except store managers, persons above the rank of store manager, corporate officers, meat department manager, office staff, persons regularly employed for not more than twenty-four hours a week and students employed during the school vacation period.

### *PART-TIME UNIT:*

All employees of Jean-Marc Lalonde Limited, carrying on business as Marché Lalonde at Alfred, Ontario, regularly employed for not more than twenty-four hours a week and students employed during the school vacation period, save and except store managers, persons above the rank of store manager, corporate officers, meat department manager, and office staff.

2. The application, having been brought on December 9, 1982, is timely and, if the statements of desire ("petitions") filed in support of it are found to be voluntary, the number of signatories to the petitions would be more than forty-five per cent of the employees in the bargaining units described above. Therefore, the sole issue before the Board was whether the petitions are voluntary. Two lists of employee names were filed, but only one of them contained signatures, 15 in total.

3. The only evidence before the Board is that of the originator and circulator of the petition, the applicant. Mr. Joanisse admitted he is the son of the owner of the numbered company (454855 Ontario Ltd.) which employs the employees in the above-described bargaining units and which is bound by the collective agreement. A few months prior to the respondent being certified as bargaining agent in November of 1980, his father's company acquired ownership of Marché Lalonde's store at Alfred, Ontario. Mr. Joanisse himself has been working in the store since August of 1981 as a butcher. He indicated that on the store manager's days off and vacation absences, he acted as manager of the store. Mr. Joanisse acknowledges that he guessed employees could view him as a part of management but pointed out that he was not described as such in the bargaining unit and therefore he paid dues in the normal course to the defendant. Mr. Joanisse's father does not live in Alfred. Mr. Joanisse resides during the work week in Alfred at a residence owned by his father and some 1000 ft. away from the store. He resides with his father on weekends at a place other than Alfred.

4. Mr. Joanisse got the idea that a petition should be circulated sometime in December of 1981 or January of 1982. He had concluded that there was little utility to the union in a store of 24 employees where "everybody knows everybody". He felt that the reason why the certification took place originally was because of the old owners and he, together with a lot of the employees, thought the union was not worth having any more. There had been a petition two years ago where employees had indicated a desire to no longer be represented by the union but this petition had been "too late". Mr. Joanisse did not explain what he meant by this. Mr. Joanisse contacted his father's lawyer and was referred by him to another lawyer. The latter obtained the necessary forms from the Board. Mr. Joanisse indicated that he had supplied his lawyer with the names of those in the bargaining unit grouped as follows: those he was certain were strongly against the union, those he thought were against the union, and those who he felt certain strongly supported the union. The first two groups were contained in a document his lawyer prepared showing 15 typed names. The latter were contained in a document showing 9 typed names. Both had the typed heading:

*RE: MARC JOANISSE AND AFL;CIO;CLC, LOCAL 414]*

We, the undersigned signify that we no longer wish to be represented by the Respondent.

Mr. Joannis only sought the signatures of those on the 15-name list. Attached to this list was a copy of Board Form 17 – Application for Declaration Terminating Bargaining Rights. Mr. Joannis circulated it sometime in late November or early December 1982. All of those he approached signed. The time lapse between the first and last name signed was 3–4 days. Some were approached at the store on their working hours to sign the petition and they did so. Some were approached at the store on their break and signed. Some signed after having attended a meeting at Mr. Joannis's residence in Alfred, having been personally invited by Mr. Joannis to attend at such meeting. Some of those invited to three such meetings were told the purpose of the meeting was in order for Mr. Joannis to "talk to them about something". When any of them queried this, Mr. Joannis said he couldn't talk about it in the store. He indicated to only a few of those invited to his home that the subject matter of the discussion at his home would be the petition he was organizing to get the union out. All of those he invited to his home came. Many had never received an invitation to his home before, although a few he met socially and had been "picked up" at his home to go elsewhere. Three of the employees, after having signed the petition, attended subsequent meetings and visibly supported Mr. Joannis's efforts.

5. Mr. Joannis appeared to have consistently explained what the application was for – reading Form 17 to the prospective signatory. For some signatories the explanation or prelude prior to signing was very short, because in Mr. Joannis's opinion they were against the union and it did not take much persuading. For others the conversation or discussion lasted longer. In the case of the three employees who signed and later visibly supported Mr. Joannis, they attended a 1–2 hour meeting at Mr. Joannis's home. At this and a subsequent meeting where the three employees, together with other employees, were in attendance, Mr. Joannis explained how it would be better without a union. He pointed out that the employees were paying \$200–\$300 per year for protection but the union was not protecting them. He pointed out to some or all the signatories that the reason why his father's stores in Ottawa were not unionized was because of how his father is in business and how he treats his employees. Mr. Joannis claimed personal knowledge of his father's business and employee practices because of having known his father for 23 years and because he had worked in his stores. (Mr. Joannis did not testify as to his age but he appeared to be in his 20's.) He indicated his father was approachable and could resolve an employee's problem. There was therefore no use for stewards. Mr. Joannis initially admitted he indirectly said to some employees there was a possibility of a strike in the then current set of negotiations but then later in his testimony said he could not recall specifying this at the time he was circulating the petition. He did admit that he spoke to some employees before they signed about the nature of the union's demands at the bargaining table and the possibility of a strike or cessation of operations. He did so by pointing to the number of companies going into bankruptcy and explaining that this was caused by "unions telling companies what to do". Mr. Joannis denied that anything he said amounted to either a threat or a promise. He also indicated that he believed the



manager of the store did not know of his circulating the petition because he kept it secret.

6. The single most significant factor on the evidence before us is the family relationship between Mr. Joanisse and his father, the effective owner of the store in Alfred. While the Board has in previous cases pointed out that the mere existence of a family relationship is not conclusive on the issue of whether a petition is voluntary (see *Otto's Deli*, [1980] OLRB Rep. Nov. 1673), and has found in some circumstances that a petition executed by a family member could be adjudged voluntary (see *International Beverage Dispensers and Bartenders Union Local 280*, [1981] OLRB Rep. June 690), the Board finds that on the facts of this case the applicant has not satisfied us that the petition was voluntary.

7. We are satisfied that in these circumstances employees could reasonably perceive Mr. Joanisse to be an arm of his father and, hence, management. He was the manager when the regular manager was away. In his discussions with some of the employees he relied upon his knowledge of his father's business practices to show the lack of need for a union and he could reasonably be regarded as an agent for his father's business practices to show the lack of need for a union and he could reasonably be regarded as an agent for his father's interests and not merely a fellow employee expressing an honestly-held, independent belief. He not only was his father's son but acted the part and these were close family ties which must have been apparent to some, if not all, of the employees who signed the petition.

8. For all of these reasons the Board hereby finds the petition not to be voluntary and therefore dismisses the application.

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**1574-82-M; Technical, Office, Professional, Local 1535, Applicant v. Northern Telecom, Respondent**

**Employee Reference – Practice and Procedure – Board setting out its jurisdiction on referrals on employee status – Board determination restricted to employee status for purpose of Act – Question of whether employee within bargaining unit must be resolved through arbitration**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and F. W. Murray

**DECISION OF THE BOARD;** January 14, 1983

1. This is what purports to be an application under section 106(2) of the *Labour Relations Act*. The application takes the form of two letters from the union dated November 4, 1982, and November 11, 1982, which read as follows:

November 4, 1982

Dear Sir:

At this point in time we have a point of contention with Northern Telecom, Bramalea.

Our problem is with two (2) non bargaining unit people doing bargaining unit work. We are proceeding through the grievance procedure, however Northern Telecom refuses to bring one of these non bargaining unit people to the grievance hearing.

I hereby request that you send in an impartial referee to resolve this situation.

November 11, 1982

Dear Sir:

I request the Board assign an officer to investigate a violation of the act, namely that the Company has assigned supervisors to perform work of the bargaining unit.

We request this investigation under 106.2 of the act. Supervisors involved were:

D. Champagne  
H. Thornicroft  
R. Luttrell

Work performed by these individuals is similar in scope to that of members of the bargaining unit. The Company contends that they are supervisors.

Our contention is that they are not supervisors based on the fact that they have no one report to them and do not exercise managerial control.

This letter is being sent to further clarify the letter of November 4, 1982 which was sent by myself.

The relevant provisions of the *Labour Relations Act* are sections 1(3)(b) and 106(2):

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

• • •

- (b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

106.-(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

(emphasis added)

2. The purpose of section 1(3)(b) is to ensure that persons in the bargaining unit are not faced with a conflict as between their interests as members of the bargaining unit, and such obligations to their employer as may arise from the exercise of managerial responsibilities. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose objectives are sometimes divergent. This conflict of interest problem is avoided by excluding "managerial" personnel from the definition of "employee" and, therefore, from coverage by the Act or participation in collective bargaining. The line is drawn where, *in the opinion of the Ontario Labour Relations Board*, an individual exercises "managerial functions". That decision is final and binding for all purposes (see sections 106 and 108).

3. One of the ways in which an employee status issue can come before the Board is under section 106(2), when a question arises between the parties as to whether an individual is, or is not, an "employee" *for the purposes of the Act*. It is important to note, however, that the issue before the Board under section 106(2) concerns the application of the statute and the statutory definition of the term "employee" – not whether an individual is covered by a collective agreement. This is a somewhat different issue.

4. A collective agreement has no common law foundation. Its legal characteristics are drawn from the Act, and by definition (see section 1(1)(e) ), it prescribes the terms and conditions of "*employment*" for "*employees*" represented by the union which, in turn, is an "organization of employees". Moreover, (see section 50) it is only binding upon "the employees in the bargaining unit" defined in it. In both cases, the term "employee" must be taken to exclude persons who by virtue of section 1(3)(b) are not "employees" under the Act. Indeed, given the array of provisions designed to ensure the separation of employer and employees (see sections 1(3)(b), 13, 48, 64 and 106) it would be anomalous if management were in the bargaining unit or covered by the collective agreement. It follows that if an individual exercises managerial functions he is not an "employee" under the Act, and cannot be considered an "employee" for collective bargaining purposes, or to whom the negotiated collective agreement applies. Finally, since employee status under the Act turns on the opinion of the Ontario Labour Relations Board, it is doubtful whether an arbitrator under a collective agreement has any jurisdiction to resolve this issue. It is the opinion of this Board in the exercise of its exclusive jurisdiction which is determinative.



5. For the foregoing reasons, a Board determination that an individual exercises managerial functions and is not an "employee" under the Act may well be determinative of his status under a collective agreement. If, in the opinion of the Board, he exercises managerial functions, then he is not an employee, and the agreement cannot apply. On the other hand, if, in the opinion of Board, he does *not* exercise managerial functions then he is an employee under the Act to whom the agreement *may* apply depending on its terms. But it does not necessarily follow that "all employees" will be covered by an outstanding collective agreement. That depends upon the bargaining unit description which the parties have negotiated. It is not at all unusual for certain employee categories to be excluded from a collective agreement. These employees are not covered by the agreement even though they are legally eligible for coverage. Likewise, it is not unusual for disputes to arise between the parties about the application of the agreement to individuals who are clearly employees, but who may nevertheless be beyond the scope of the agreement because the contractual language is not broad enough to cover their job classifications. These are questions which must ultimately be resolved by arbitration, since they involve the interpretation of the collective agreement. Of course, if the dispute centres on a term such as "foreman", "supervisor", or other word intended by the parties to denote managerial status, then the Board decision will probably resolve the interpretation problem and make a resort to arbitration unnecessary. It is unlikely that the parties intended such terms to include persons who are not really "managerial" under the Act.

6. To summarize then:

- (a) If the issue between the parties involves the status of an employee under the Act, then the Board has exclusive jurisdiction to determine that issue.
- (b) The fact that an individual is an employee under the *Labour Relations Act* does not necessarily mean that he falls within the negotiated scope of any particular collective agreement.
- (c) If an individual is admitted to be an employee under the Act then his inclusion in a negotiated bargaining unit is for an arbitrator to determine.
- (d) Where the parties' dispute involves language denoting managerial status, the Board's decision with respect to who is "management" for the purposes of collective bargaining under the Act, will likely be sufficient to resolve the dispute.

7. On the basis of the material before the Board, it is difficult to characterize the issue between the parties. The initial union letter dated November 4, 1982, suggests that the problem involves non-bargaining unit persons doing bargaining unit work. That is not normally an issue which can be resolved under section 106(2). Any restriction on "managerial" persons doing bargaining unit work, must be found in the terms of the collective agreement, and that is a matter of its interpretation, with resort, if necessary, to an arbitrator. If, on the other hand, the union's position is that certain individuals are *not managerial at all*, because they do not exercise managerial functions and are

“employees” under the Act, then that is a matter which the Board can determine. But that decision may or may not determine whether they are covered by the existing collective agreement. As we have already noted, it is quite possible for an individual to be an “employee” under the Act, but still not fall within the language of the scope clause of the collective agreement. We might also note that where an application under section 106(2) is made during the currency of an existing collective agreement, the Board’s practice is to confine its enquiry to the *changes* in the duties and responsibilities of the disputed individuals since that agreement was executed (see *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572.) Finally, we direct the attention of the parties to the general principles enunciated in *Corporation of the City of Thunder Bay* [1981] OLRB Rep Aug 1121, and the observations of the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept 379 which involves persons performing “mixed” duties some of which are arguably managerial and some of which are not.

8. In the circumstances of this case, as they presently appear, the Board does not consider it appropriate to appoint a Labour Relations Officer. Rather, the Board considers it necessary to solicit further representations from the parties concerning the nature of the dispute between them and, in particular, a brief statement of the duties and responsibilities which they allege the disputed individuals perform. Accordingly, before proceeding further with this application, the Board deems it appropriate to extend to the parties, and particularly the applicant union, an opportunity to particularize their positions and clarify the nature of their dispute.

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**0746-82-M;** I.B.E.W. Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 1788 Applicants, v. **Ontario Hydro** Respondent

Construction Industry Grievance – Union referring grievor to employment through hiring hall – Work projects at nuclear sites and non-nuclear sites – Employer refusing to hire grievor – Grievor’s alleged association with IRA raised as security threat – Extent of employer’s discretion to reject referrals from hiring hall – Test of reasonableness applied

**BEFORE:** George W. Adams, Q.C., Chairman and Board Members W. H. Wightman and F. S. Cooke.

**APPEARANCES:** *S.B.D. Wahl, R. Tersigni and J. Mulhall for the applicants; and Ross Dunsmore and Bob McLellan for the respondent.*

**DECISION OF GEORGE W. ADAMS, Q.C.;** January 24, 1983

1. This matter involves the referral of a grievance to arbitration under section 124 of the *Labour Relations Act*.

2. The applicants grieve the respondent's refusal to hire William Gilroy, a member of I.B.E.W. Local 1788 and its president. The grievance is filed under a collective agreement operative from May 1st, 1982 until April 30th, 1984. The details of the grievance are set out in a letter dated July 5th, 1982 sent on behalf of the applicants to Mr. Garth Leader, Manager of Construction for the respondent. The letter reads:

Attention: Mr. Garth Leader  
Manager of Construction

Dear Sirs:

Re: Collective Agreement Between the Electrical Power Systems Construction Association and the I.B.E.W. Electrical Power Systems Construction Council of Ontario effective from May 1, 1982 to April 30, 1984

Re: Refusal to Rehire William Gilroy

We wish to inform you that we have been retained on behalf of the I.B.E.W. Electrical Power Systems Construction Council of Ontario and the International Brotherhood of Electrical Workers Local 1788 (hereinafter collectively referred to as "the Union") with respect to the above-captioned grievance.

The union and the Electrical Power Systems Construction Association entered into a Collective Agreement effective from May 1, 1982 until April 30, 1984 ("the Collective Agreement"). The Collective Agreement is binding upon Ontario Hydro.

The Union, on its own behalf and on behalf of the Grievor, William Gilroy, herewith grieves that from on and after June 17, 1982 and continuing to date, Ontario Hydro has violated and continues to violate the Collective Agreement in that Ontario Hydro has failed or refused to:

- (i) employ the Grievor, William Gilroy, being a reliable and competent Union member contrary to Section 7 - Employment Practices/Hiring, paragraph 700C; and
- (ii) hire the Grievor, William Gilroy, after three (3) working days' notice to Ontario Hydro as a replacement for permit holders and/or travel card members currently in the employ of Ontario Hydro at the Pickering Generating Station, contrary to Section 7 - Employment Practices/Hiring, paragraph 701A (II),

in circumstances where the Grievor, William Gilroy, has been referred to the Pickering Generating Station of Ontario Hydro in accordance with the provisions of the Collective Agreement.



As a result of the aforementioned violation of the Collective Agreement, Ontario Hydro has failed or refused to pay proper wages, overtime, reporting pay, inclement weather pay, call-in pay and vacation and recognized holiday pay, travel, room and board allowance, contrary to Sections 8, 9, 10 and 11 and Local Union 1788 Appendix, Section 3 and 4 of the Collective Agreement.

#### RELIEF SOUGHT

1. A declaration that Ontario Hydro has violated the Collective Agreement as herein before set forth;
2. An Order requiring Ontario Hydro to employ and reinstate the Grievor, William Gilroy, with full seniority at the Pickering Generating Station;
3. Damages against Ontario Hydro for all consequential loss of wages, overtime, reporting pay, inclement weather pay, call-in pay, welfare, pension, supplementary unemployment benefits, Union Dues, vacation and recognized holiday pay, room and board and travel allowance in accordance with the Collective Agreement;
4. An Order that Ontario Hydro pay to the Union such fees and expenses, legal or otherwise, as it may have incurred by reason of the aforementioned violations of the Collective Agreement;
5. Such further and other relief as may be appropriate in the circumstances.

We wish to advise you that we have been instructed to refer this Grievance to Arbitration by the Ontario Labour Relations Board pursuant to Section 124 of the *Labour Relations Act* unless these matters are forthwith rectified.

Yours very truly,

KOSKIE AND MINSKY

3. At the outset of the hearing differences arose between the parties over whether or not the conduct complained of constituted a discharge under the terms of the collective agreement and, if not a discharge, whether or not the collective agreement contemplated arbitral review of the hiring process. The principal provisions of the collective agreement pertaining to these issues include sections 1(A) (para.2), 2(D), 6(C), 7, 13(G), 1301 (B), and the appendix applicable to Ontario Hydro employees only (sections 1 and 1(B) ). They provide:

#### SECTION 1 PREAMBLE

- A. WHEREAS the Union, as defined in the covering page of this Collective Agreement, has in its membership competent, skilled

and qualified journeymen and apprentices to perform work coming within the trade and craft jurisdiction;

## SECTION 2 SCOPE OF AGREEMENT

- D. The term "employee" shall include all employees of the Employers in the classifications as set out in Item B above.

## SECTION 6 EMPLOYEE DESIGNATION

- C. The selection and retention of foremen and subforemen will be the responsibility of the employers. When making appointments to the foreman and subforeman level, the Employers will give consideration to those journeymen they presently employ.

## SECTION 7 EMPLOYMENT PRACTICES/HIRING

- A. For purposes of this Section, a geographic area will be established for each Project in accordance with the geographic jurisdiction established in Section 200, Subsection 202, of this Agreement.
- B. An office will be established by EPSCA for each Project. A purpose of this office will be to coordinate employment as specified in this Section.
- C. EPSCA and the Union will exchange the names of their representatives in each of the areas described in Item A who will be responsible for co-operating in the referral and employment of reliable and competent Union members.
- D. EPSCA will notify the Union of future manpower requirements for all employees coming within the scope of this Agreement.
- E. The Union recognizes that where key tradesmen are required, the number will be jointly determined at a prejob conference provided for in Section 4, Subsection 400, of this Agreement.

### 701 Hiring and Layoff

- A. The employment and layoff of tradesmen and apprentices, excluding key tradesmen, shall be carried out on the following basis and sequence:
  - (i) The Employer agrees to hire and employ only members of the International Brotherhood of Electrical Workers on all electrical work. The EPSCA office will request the appropriate Local Union office for certified tradesmen and apprentices required and no one will be employed unless

they are in possession of a clearance card from the Local Union office.

- (ii) If the Local Union is unable to furnish certified Local Union or travel card members to the Employer within three (3) working days of the time the Local Union office receives the request for tradesmen (excepting Saturdays, Sundays and Holidays), the Employer shall be afforded the right to employ certified tradesmen (travel card members or permit holders) as are available. The Local Union will issue clearance cards to tradesmen hired in these circumstances. All employees shall register with the EPSCA office prior to commencing work. Travel card members may be replaced by Local Union members and permit holders may be replaced by Local Union members or travel card members who maintain a regular residence in the geographic area of the project after three (3) working days' notice to the Employer, but in no case until a tradesman has worked a minimum of one week.

B. In all cases of layoff, except as noted in the Local Union 1788 Appendix, the Employer shall layoff its employees in the following sequence:

- (i) permit holders;
- (ii) travel card members;
- (iii) Local Union members.

C. When possible, the Employer shall notify the Local Union Office three (3) days prior to layoff.

## SECTION 13

G. Alleged unjustified termination, discharge, suspension or disciplinary action may be grieved beginning at First Step.

## SECTION 1301

B. The arbitration board shall have no power to add to or subtract from or modify any of the terms of this Agreement. The arbitration board shall not substitute its discretion for that of the parties except where the board determines that an employee has been discharged or otherwise disciplined for cause when this Agreement does not contain a specific penalty for the infraction that is the subject matter of the arbitration. In such cases, the arbitration board may substitute such other penalty for the discharge or discipline as to the arbitration board seems just and



reasonable in all circumstances. The arbitration board shall not exercise any responsibility or function of the parties. The arbitration board shall not deal with any matter not contained in the original statement of grievance filed by the party referring the matter to arbitration.

LOCAL UNION 1788 APPENDIX  
Applicable to  
Ontario Hydro Employees Only

SECTION 1 UNION SECURITY

- A. All employees falling under the jurisdiction of Local Union 1788 as noted in section 2 – Scope of Agreement, Subsection 202 – Geographic Jurisdiction, of the master portion of this Agreement will be members or will apply for and secure membership in Local Union 1788 within fifteen (15) calendar days, and will maintain such membership in good standing in the Union as a condition of employment.
- B. A checkoff system of Local Union 1788 initiation fees and dues will be made operative for the lifetime of this Agreement. The Employer will supply full checkoff lists of employees subject to checkoff at regular intervals, and agrees to collect monthly for the Union dues and initiation fees payable to Local Union 1788. The Employer will transmit the monies so collected to the designated officials of Local Union 1788. Local Union 1788 will indemnify the Employer for any liability arising from the deduction of initiation fees and dues as requested by Local Union 1788.
- C. Any changes in initiation fees or dues will be referred to the Employer through the Accredited Union Representative of Local Union 1788 before such changes are put into effect.
- D. The Employer will arrange for each workman falling under the jurisdiction of Local Union 1788, as noted in Section 2 – Scope of Agreement, Subsection 202 – Geographic Jurisdiction, of the master portion of this Agreement who is covered by this Agreement, to sign a Local Union 1788 dues checkoff authorization at the time he is employed.
- E. Local Union 1788 is required to make arrangements with new employees for them to join Local Union 1788 as provided for in Subsection 100, Item A, of this Section. The Employers will checkoff initiation fees on receipt from Local Union 1788 of such authorization signed by the employee.

## SECTION 2 SENIORITY

B. In cases involving reduction of staff, an employee will not lose his service credit unless he has a break in service of greater than six (6) months. An employee terminated for any of the following reasons will not lose his service credit unless he has a break in service of greater than three (3) months:

- (i) discharge for cause;
- (ii) voluntary termination;
- (iii) layoff necessitated by refusal to accept a transfer resulting from the implementation of the seniority clause.

4. In the circumstances the Board decided to reserve its decision on the characterization of the complaint and the location of the legal burden of proof. The Board further directed the applicant to proceed first. The grievor was initiated into the applicant union on May 12th, 1967 and has never been suspended or expelled from membership. He was employed with Ontario Hydro at the following locations and dates involved.

November 23rd/66 to October 18th/67 – Lakeview GS, terminated for cause – fighting.

January 8th/68 to February 23rd/68 – Eastern Construction Zone (Peterborough) reduction of staff.

May 28th/68 to December 17th/68 – Lakeview GS – reduction of staff.

December 31st/68 to July 5th/72 – Pickering “A” – voluntarily terminated.

September 8th/72 to July 25th/73 – Pickering “A” – reduction of staff.

November 2nd/73 to April 1st/74 – Pickering “A” and Lakeview – voluntarily terminated.

May/74 to July 16th/74 – Nanticoke GS – voluntarily terminated.

April 23rd/75 to June 11th/75 – Lakeview GS – voluntarily terminated.

September 25th/78 to January 12th/79 – Southern Construction Zone (Toronto) – reduction of staff.

May 22nd/79 to August 13th/79 – Southern Construction Zone (Toronto) – reduction of staff.

February 4th/80 to July 13th/81 – Pickering “B” – voluntarily terminated.

October 18/81 to February 5th/82 – Pickering “B” – voluntarily terminated.

5. His last period of employment commencing October 19th, 1982 was as a result of being referred to replace a travel card member pursuant to section 701(A)(ii).

6. Up until July of 1982 travel card members were working at Pickering “B” and in mid-June of 1982 the grievor was referred to that site pursuant to the collective agreement to replace again a travel card member. Joseph Mulhall, Business Agent and Financial Secretary for Local 1788 advised Jim Ella, Assistant Personnel Manager, at the respondent's Pickering location that Gilroy would be reporting for work on June 17th, 1982. The referral slip issued by Local 1788 is dated June 15th, 1982. However, Shawn O'Dwyer, an assistant in the Personnel Department at Pickering indicated that Mr. Gilroy was not suitable for employment and Mr. Gilroy was handed the following letter over the signature of G.T. Leader, Manager of Construction, on reporting to the Pickering “B” construction site for work. The letter reads:

June 17, 1982

Dear Mr. Gilroy:

This will confirm my instructions to Mr. J. Mulhall, Business Manager of the I.B.E.W. Local Union 1788, that you will not be hired at Pickering G.S. “B”. You are unsuitable for employment.

Yours truly,

7. Mr. Gilroy was subsequently referred to the Bruce Generating Station Project to bump a travel card electrician but was again refused employment. The employer's position was communicated to Mr. Mulhall over the signature of D.J. Laut, Project Personnel Manager, Bruce G.S., in a letter dated July 9th, 1982 which reads:

Dear Mr. Mulhall:

On July 8, 1982, you called me to tell me that Local 1788 planned to refer Mr. W. Gilroy to the Bruce G.S. project to bump out a travel card electrician.

This is to confirm my telephone call to you today in which I advised you not to refer Mr. Gilroy to this project as he is considered unsuitable for employment.

Yours truly,



8. Hugh Gillis, Chief Steward at the Pickering Project for Local 1788, testified that he was unaware of any “no-rehire” being placed against Gilroy’s name prior to the respondent refusing to rehire him in June. The employer’s “no-rehire” policy was communicated to the union by letter dated February 5, 1979 over the signature of G.A. Pickell, Manager, Construction Labour Relations. While the collective agreement then in operation contained materially different wording at the time, the letter is worth reproducing. It reads:

Mr. Hank Schueler  
Business Manager, Financial Secretary  
Local Union 1788  
International Brotherhood of Electrical Workers  
3500 Danforth Avenue  
Scarborough, Ontario  
M1L 1E1

Dear Mr. Schueler:

Sorry for the long delay in responding to your letter, however, the delay was intentional. I knew that Ontario Hydro’s policy with regard to no-rehire was under review, and I felt that I should wait until that review was completed before responding.

As I indicated to you at our meeting of November 16, 1978, I agree with the position taken by Mr. O’Neill. Based on our collective agreement, I do not believe that a no-rehire letter is subject to grievance, however I also realize that such a letter has serious implications and, therefore, is of major concern to both you and your membership.

Just recently, Lines and Stations and Generation Projects collectively established the following policy regarding no-rehire letters which will eliminate most, if not all of your concerns:

1. In the case of a reduction of staff, an employee will not be given a no-rehire status. If an employee is inadequate to the extent that the Employer no longer wants him on the payroll, the employee should be discharged, not laid off.
2. In the case of voluntary termination, a no-rehire should not be utilized. If an employee who voluntarily terminates his employment has been viewed as lacking in skill or having a poor attitude, etc., his weaknesses should be pointed out to him in writing at the time of his termination. He should be made aware that if he is subsequently rehired his tenure will be contingent upon an improvement in these areas.
3. A no re-hire status may be placed on a former employee in the case of discharge for cause. This status should be clearly pointed

out in writing to the employee and his union representative at the time of discharge.

I suggest we allow an appropriate period of time for this policy to be tested and then review its effectiveness at a Standing Committee meeting.

Yours truly,

9. Following the referral to the Bruce GS Project, Mr. Mulhall was also advised that the respondent would not employ the grievor at the Sir Adam Beck Power Plant, Cherry Wood Transformer Station and Strachan Avenue Transformer Station. Mulhall testified that he currently has no other member available to work for Local 1788 except Mr. Gilroy. Where Local 1788 has no other members to refer, Mr. Mulhall honours manpower requests of the respondent by recourse to the out of work lists of other locals of I.B.E.W. in the vicinity. Under the Transmission Systems collective agreement, Local 1788 mails the referral slip to the appropriate (Electrical Power Systems Construction Association) EPSCA representative who is notified of the people being sent. At Pickering, the person referred obtains a referral slip from Local 1788's union hall before going to work. However, under either collective agreement, all referral slips are issued by Local 1788 in that it has a province-wide jurisdiction in its relationship with the respondent and EPSCA.

10. Adelaide Electric Company Limited is a subcontractor to the respondent on the Bruce "B" site performing construction work in relation to the central maintenance building at the Bruce Nuclear Power Development. The central maintenance building is outside the inner security perimeter established for the Bruce Generating Station "A". It is also outside the security perimeter for Bruce "B". The entire site embraces 2300 acres which is fenced off. No security forces surveil the outside fence. Inner security perimeters are established for Bruce "A", Bruce "B", Bruce Heavy Water, and Douglas Point. Each of these perimeters have gates which are manned by security officers. At Bruce "B" no pass is required and guards simply check for hard hats as employees walk through the open gates. At Bruce "B" a pass is required and at Douglas Point and the Heavy Water site entry requires a plastic identification card which is to be worn at all times. To work on the central maintenance building, a plastic identification card would not be required.

11. Thomas McKee, a personnel officer at Bruce Nuclear Power Development observed Mr. Gilroy signing employment forms on August 10th, 1982 at the Bruce site pertaining to a referral to Adelaide Electric. After Mr. Gilroy had left the office and Mr. McKee had discovered who he was, McKee asked Adelaide Electric to refer him back to the EPSCA office. When Mr. Gilroy returned to the office, Mr. McKee told him he was not considered suitable for employment on an Ontario Hydro site. Mr. McKee knew of no other incident since 1981 when EPSCA had taken the position that a person should not be hired by "an outside contractor". Mr. McKee testified that he was aware of Gilroy's name and that a grievance over his employment had been filed. He therefore checked with a number of people in Labour Relations and was advised that the wisest thing to do was to put down in writing that Gilroy was unsuitable for employment. He testified that prior to Gilroy actually appearing there had been inter-

divisional meetings and informational exchanges involving Gilroy's situation. He testified that Bruce "B" had decided, as a result of this information, not to employ Gilroy if he was referred to work at the Bruce location.

12. From the evidence it is fair to conclude that in all the refusals, the primary justification for the refusal to hire the grievor was as outlined by Garth Leader, Manager of Construction at Pickering "B" Generating Station. Pickering "A" Generating Station is a four unit nuclear generating station. Each unit has a capacity of five hundred megawatts. Pickering "B" is another four unit electrical generating station which is under construction. Pickering "A" has set many world-wide records for the efficient generation of electricity. It costs \$750 million to build and it is estimated that Pickering "B" will cost \$3 billion dollars by completion. The first Pickering "B" unit started up in October of 1982. Another unit should become active in the fall of 1983. A considerable amount of technical information pertaining to the site was filed with the Board and interpreted by Mr. Leader. The nerve centre to the site is the control room. Security arrangements were also described by Mr. Leader. It was his opinion that once on the construction site, an employee has free and easy access to any place under construction. There is a guard between the operational site and the construction site, but the primary concern of that guard would appear to be the monitoring of radio activity and exposure to radiation. Employees must stop and pick up a badge which, in effect monitors exposure to radiation. Provided one has a yellow hard hat on, access to the construction site appears relatively easy to achieve. Only a visual check of workers occur as they walk through the gate.

13. Leader testified that he made the decision not to rehire Gilroy. Prior to Gilroy presenting himself Leader had received the following memorandum from the respondent's Security Department dated February 25, 1982 together with attached newspaper articles also reproduced below:

Memorandum to ALL SECURITY OFFICERS  
BUSINESS ADMINISTRATORS/SUPERVISORS  
ALL THERMAL STATIONS AND NPD-GS

Location or Dept

Subject Ontario Hydro Employee Voluntarily Terminated

The following is submitted for your information.

On Friday, February 5, 1982, William Gilroy, age 36 years, DOB February 27, 1945, SIN #432 704 575, 82 Ventury Drive, St. Catharines, Ontario, voluntarily terminated his employment with Ontario Hydro at Pickering NGS "B", Construction.

He was employed there as an electrician, and previously worked on construction at Lakeview GS, Nanticoke GS, Southern Zone Construction, Pickering NGS "A" and possibly other locations. Gilroy is currently President of IBEW, Local 1788.



During the weekend of February 6 and 7, 1982, Gilroy was one of five Irish Nationals arrested while crossing the border from Canada into the United States. Two other Canadians arrested were William O'Neill, age 26, and James Kelly, age 42, both from St. Catharines, Ontario. The three Irish Nationals were ordered to be temporarily removed from the U.S. without an immigration hearing. Gilroy, O'Neill and Kelly, all landed immigrants, were returned to Canada, after posting bail of \$5,000 to appear in the United States on charges under the immigration law of aiding and abetting to illegally enter the country, using false statements, plus criminal charges.

Immigration officials said after the arrests, they seized a shopping list of guns and ammunition to be bought in the United States. All charges occurred outside of Canada.

In a subsequent U.S. federal district court hearing, Gilroy admitted that he had been sentenced to two years in 1975, after pleading guilty to conspiracy to export arms to the Irish Republican Army. Gilroy served his sentence from June, 1975, until his release in October, 1976.

Attached are photocopies of four newspaper clippings taken from the Globe and Mail, The Toronto Sun and Toronto Star.

You may wish to discuss this with your staffing officers.

For further details, contact the Criminal Investigation Section, Security Division.

To. SUN - mcs 1/82

# Story ties Irish national to Mountbatten murder

BUFFALO, N.Y. (UPI-Special) — An Irish national being detained at Hamilton-Wentworth Detention Centre for deportation from Canada has been under investigation by British authorities for the 1979 killing of Lord Mountbatten, a Buffalo newspaper reported yesterday.

Both Edward Howell, who was ordered deported from Canada on Friday, and Desmond Ellis have been investigated in connection with the killing.

Both were charged with trying to enter the U.S. illegally last month.

Howell is being held until his travelling papers are arranged, an immigration official said last night.

Ellis is still in Erie County Correctional Institute seeking political asylum.

The Buffalo News said classified documents based on

reports from the Royal Canadian Mounted Police and British authorities described Ellis and Howell, both of Belfast, Northern Ireland, as primary suspects.

The News said Ellis, 29, was described in the documents as the possible electronics expert and Howell, 35, as the "brains" behind the assassination of Lord Mountbatten, 79, the cousin of Queen Elizabeth and uncle of Prince Phillip.

The World War II hero was killed Aug. 27, 1979, while boating at his summer residence on the Irish coast. Authorities said his yacht was hit by an explosion touched off by an Irish Republican Army bomb.

Ellis reportedly has ties with the IRA and is wanted as a suspect in several IRA bombings, the newspaper said.

Ellis and Howell were two of the five people charged with illegally attempting to enter the U.S. from Canada Feb. 6. The other three are Irish natives living in St. Catharines. Authorities said the five had intended to purchase arms and take them back to Northern Ireland.

## EX-METRO MAN HAS PAST CONVICTION

# Four in U.S. gun rap get bail

By STEVE PAYNE

Staff Writer

One of five Irish nationals arrested in the U.S. on a suspected arms buying mission is a former Metro resident who was jailed for two years in 1975 for conspiracy to export guns.

William Gilroy, 37, now of St. Catharines, was one of four men who pleaded guilty in 1975 to conspiring to export guns between

Jan. 1, 1973, and July 1, 1974.

In court, it was said the weapons were going to Northern Ireland. Gilroy lived in Don Mills then.

He is one of three Irish nationals ordered temporarily removed from the U.S. this month without an immigration hearing. The three are back in Canada.

The three, all landed immigrants, returned after each posting-ball of

\$5,000 to appear in the U.S. on a date to be fixed on charges under the immigration law of aiding and abetting to illegally enter the country and using false documents, plus criminal charges of conspiring to enter the U.S. illegally.

The two others who returned to Canada are William O'Neill, 26, and James Kelly 42, both of St. Catharines.

The remaining two, who

face similar charges, are residents of Belfast, Northern Ireland. One, Edward Howell, 35, has posted bail of \$10,000 and hopes to return to Canada today. Desmond Ellis, 29, failed to post bail of \$25,000 and was detained.

Authorities say Ellis is sought in Ireland under an alias as a fugitive who jumped bail after being charged with possession of an explosive device.

Officials believe the five, arrested Feb. 6 as they attempted to enter the U.S. in cars on the Whirlpool Bridge in Lewiston, N.Y., intended to buy weapons to take to Northern Ireland.

During the 1975 court case, it was heard that Gilroy was one of the leaders of a group that tried to send 15 semi-automatic military rifles and a machinegun to Ireland via the U.S.

The Toronto Sun, Monday February 22, 1982



# U.S. arrests IRA suspects at border

From Associated Press and Reuter

BUFFALO, N.Y. — Five people were arrested during the weekend trying to enter the United States illegally from Canada to procure arms for the outlawed Irish Republican Army, an immigration official said yesterday.

The arrests, reported by Benedict Ferro, head of the local Immigration and Naturalization Service office, came less than three weeks after two members of Sinn Fein, the legal political arm of the IRA, were seized while trying to enter the United States from Canada.

Three of the five people arrested were Canadian and two were from Belfast, Mr. Ferro said. They were later identified as Michael Weir, 36, and Edward Howell, 35, both of Belfast; and William O'Neill, 29, James Kelly, 42, and ~~Edward Howell~~, all of St. Catharine's.

Mr. Ferro said the arrests occurred "late Saturday going into Sunday" on the Whirlpool Bridge at Niagara Falls. He said the five were arrested in two cars, 20 minutes apart, and \$8,000 to \$10,000 was confiscated.

No charges were filed immediately and no hearing was scheduled, he said.

"We have substantial evidence that what we seized showed their purpose was to come down and purchase arms and ammunition in the United States," Mr. Ferro said.

Mr. Ferro said the five were taken to the Erie correctional facility at nearby Alden and held pending further legal action. He added that one of the Canadians had previously been arrested on arms smuggling charges filed by U.S. Alcohol, Tobacco and Firearms agents.

On Jan. 21, immigration officials arrested Danny Morrison, 29, a publicist for the Sinn Fein, and Owen Carron, who was elected to the British

GLOBE AND MAIL

FEBRUARY 8, 1982

Parliament to succeed the late IRA hunger striker Bobby Sands.

Last week, Mr. Ferro said a "pipeline" to sneak Irish nationalists into the United States had been broken with the arrests of Mr. Carron and Mr. Morrison.

"We have exposed the apparatus and the individuals, and it won't easily be put back together," Mr. Ferro said.

Meanwhile in Belfast, bombs destroyed two hotels and a club in Northern Ireland yesterday in what authorities believe was a show of strength by the IRA.

The buildings were emptied before the blasts and there were no injuries.

# 5 arrested at border threaten fast

114

Toronto Star special

BUFFALO — Two Irishmen and three Canadians accused of trying to enter the United States illegally say they will start a graduated hunger strike today to protest their treatment in custody.

The five men, who were indicted yesterday, are believed to have been planning to buy arms in the United States for the Irish Republican Army. One of the Canadians, William Gilroy of St. Catharines, was sentenced in Toronto in 1975 to two years in jail for conspiring to export arms to the IRA.

The other accused are Edward Howell of Belfast; Desmond Ellis of Dublin; and William O'Neil and James Kelly, both of St. Catharines and formerly of Belfast. Gilroy also came from Belfast.

## Joined later

The men say they face up to 21 hours a day in solitary confinement in the Erie County Correctional Facility in the suburb of Malden.

Howell said in a statement yesterday that he will go on a hunger strike today in protest. If the fast continues, he will be joined on Monday by Ellis, and then by each of the three Canadians at five-day intervals.

The six-count indictment charges all five men with conspiracy to smuggle Ellis and Howell into the United States Feb. 6. As well, O'Neil, Kelly and Gilroy were charged with two counts each of smuggling aliens. Ellis was also charged with making false statements and presenting false documents, and Howell was charged

with making false statements.

The five also were being held by the Immigration and Naturalization Service on civil charges of attempted illegal entry, making false statements and alien smuggling.

Immigration officials said after the arrest they had seized a shopping list of guns and ammunition to be bought in the United States.

Immigration officials say the man they arrested as Michael Weir actually is Ellis, who is wanted in Ireland on charges of possessing explosives.

Gilroy admitted yesterday in federal district court that he had been sentenced to jail in 1975 after

pleading guilty to conspiracy to export arms.

He and Joseph Nyles, of Garden City, Mich., were found then to be the leaders of a group that tried to send 15 semi-automatic military rifles and a machine-gun to Ireland via the the United States in June, 1974.

Nyles was stopped trying to cross into the United States from Windsor with boxes of arms hidden in his car. That arrest led to six more and to the discovery of a large cache of weapons bound for Ireland.

The arsenal totalled more than 50 guns, including machine-guns.

14. Leader testified that his subordinates were advised by the union hall that the grievor would be referred to work on June 17th. The respondent was given three days' notice of this proposed assignment and Mr. Leader thereupon began to gather more data. Part of this data was another memorandum from Security over the signature of G. Kileg, Director of Security with the above newspaper articles again attached. The June 17th, 1982 memorandum reads:

Memorandum To MR. G.T. LEADER  
Manager of Construction

Location or Dept Pickering NGS "B"

Subject William Gilroy - Electrician

We understand that the above person, who has been employed by Ontario Hydro previously, is seeking to return to work at Pickering NGS "B" Construction Site. Attached is a copy of his work record with Ontario Hydro.

We strongly recommend that this person not be employed at Pickering "B" site as we consider him an unsuitable employee and a security risk.

In 1975 Mr. Gilroy was charged and convicted of conspiracy to export arms to Ireland via the USA. The attached news clippings confirm this. A transcript of the trial has been requested.

From June 27, 1975, to October 25, 1976, Mr. Gilroy spent in the Mimico correctional centre. His original sentence was two years less one day. He was refused temporary absence privileges.

On February 6, 1982, the day after he voluntarily terminated his work at Pickering "B", he and four others were charged by US Immigration authorities with conspiracy to smuggle aliens into the USA. We understand that William Gilroy, William O'Neill and James Kelly are landed immigrants of Irish descent. The other two, Edward Howell and Desmond Ellis, are Irish nationals.

In addition, Gilroy, O'Neill and Kelly were charged with two counts each of smuggling aliens (i.e. the Irish nationals). Gilroy, O'Neill and Kelly were returned to Canada after posting bail of \$5,000.00 to appear in Court in the US on a date to be set. As of this date these charges are still pending in the USA and no definite court date has been set. We are informed that the US authorities have not dropped the charges



and intend to proceed with court action in all cases concerning Gilroy, O'Neill and Kelly.

Howell had posted bail in the US, was returned to Canada and was ordered deported. He escaped from Canadian authorities at the Paris airport and turned himself in at Dublin, Southern Ireland. Ellis is apparently still in Erie County correctional institute seeking political asylum.

Inasmuch as Mr. Gilroy has been found in the company of persons suspected of an arms-buying mission for the Irish Republican Army and has been charged by US authorities, it appears that he may be continuing in unlawful activities, similar to those he was convicted of previously in 1975. Mr. Gilroy has not demonstrated to his former employer and the public that he is refraining from questionable and perhaps unlawful activities. As a result, the subject person should not be employed in a regular or temporary position with Ontario Hydro.

Ensuring the suitability of our employees, including reliability, is one of the measures taken by Ontario Hydro to provide effective security. This is even more important in work at our nuclear facilities.

15. The June 17th memorandum constituted written confirmation of what Mr. Leader was advised by telephone prior to sending a telegram to Mr. Mulhall advising him not to refer William Gilroy to the Pickering GS "B" in that "he is unsuitable for employment".

16. It was established that Mr. Gilroy served a jail sentence at Mimico Correctional Centre from June 27th, 1975 to October 25th, 1976. A true copy of an indictment in the County Court Judges, Criminal Court for the Judicial District of York pertaining to the case of *The Queen v. William Gilroy et al* was filed with the Board. The document reveals that the grievor was found guilty of Count 1 which alleged that Gilroy together with others between the 1st day of January 1973 and the 1st day of July 1974 at the Municipality of Metropolitan Toronto and elsewhere in Canada "unlawfully did, conspire and agree together, the one with the other or others of them and with person or persons unknown to commit an indictable offence to Wit: export or attempt to export from Canada goods included in an export control list, contrary to s.13 of the Export and Import Permit's Act, thereby committing an indictable offence contrary to s.423(1)(d) of the Criminal Code of Canada". The transcript of the proceedings revealed that the goods in question were 15 semi-automatic military rifles which arms were intended to be sent to Ireland by way of the United States. Others involved included a Joseph Myles, an executive officer of the Irish Northern Aid, an American organization having links with the outlawed Irish Republican Army. Mr. Myles and Mr. Gilroy received the lengthiest sentences, i.e. two years less a day, in that they were viewed as the moving forces in the conspiracy. Both men had pleaded guilty to Count 1 of the indictment.

17. Leader testified that he had a conversation with Mr. Mulhall on June 16th, 1982 and was advised by Mulhall that the new charges against Gilroy and others referred to in the two memoranda above and relating to an incident at the U.S. border on February 6th, 1982 "had been dropped". Leader therefore went back to the respondent's Security Department to verify this fact and was advised that the charges were still outstanding. It was in this regard he was sent the memorandum of June 17th, 1982. The Security Department subsequently attempted to obtain copies of the formal charges against Gilroy and therefore copies of the charges were sent to Leader some time after his actual refusal to rehire the grievor.

18. A copy of a True Bill for grand jury charges in the District Court of the United States for the Western District of New York in the case of *United States of America v. Desmond Ellis, Edward Howell, William O'Neill, William Gilroy and James Kelly* was filed with the Board and took the following form:

Form No. 100-42-11  
(Rev. 10-17-79)

# In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

DESMOND ELLIS, EDWARD HOWELL  
WILLIAM O'NEILL, WILLIAM GILROY  
AND JAMES KELLY

NOVEMBER 1981 SESSION xxxxx  
(Impanelled November 25, 1981)

NC R 82 00027.

Vio. Title 18, United  
States Code,  
Sections 371, 1544,  
1001 and 2; Title 8,  
United States Code,  
Section 1324

## COUNT I

### The Grand Jury Charges:

From on or about the 5th day of February, 1982, and continuing through the 6th day of February, 1982, in the Western District of New York and elsewhere, the defendants, DESMOND ELLIS, EDWARD HOWELL, WILLIAM O'NEILL, WILLIAM GILROY and JAMES KELLY and others to this Grand Jury unknown, unlawfully, willfully and knowingly did combine, conspire and agree together to commit offenses against the United States, to wit, to violate Title 8, United States Code, Section 1324, by bringing into the United States, DESMOND ELLIS and EDWARD HOWELL, aliens not lawfully entitled to enter or reside within the United States; all in violation of Title 18, United States Code, Section 371.

## OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants at the times hereinafter mentioned, committed the following overt acts:



1. On or about February 6, 1982, defendant WILLIAM GILROY loaned his automobile to the defendant, WILLIAM O'NEILL.
2. On or about February 6, 1982, defendant WILLIAM O'NEILL drove defendants DESMOND ELLIS and EDWARD HOWELL across the Whirlpool Bridge from Niagara Falls, Ontario to Niagara Falls, New York in the automobile of defendant WILLIAM GILROY.
3. On or about February 6, 1982, at the Whirlpool Bridge, Niagara Falls, New York, defendant DESMOND ELLIS presented to an Immigration inspector a Republic of Ireland passport in the name of Michael Gilmore and claimed to be Michael Gilmore.
4. On or about February 6, 1982, at the Whirlpool Bridge, Niagara Falls, New York, the defendant, EDWARD HOWELL, presented to an Immigration inspector a Republic of Ireland passport in the name of William McKee and claimed to be William McKee.
5. On or about February 6, 1982, defendant JAMES KELLY drove defendant WILLIAM GILROY across the Whirlpool Bridge from Niagara Falls, Ontario to Niagara Falls, New York.
6. On or about February 6, 1982, defendants JAMES KELLY and WILLIAM GILROY had in their possession the belongings of defendants DESMOND ELLIS and EDWARD HOWELL.
7. On or about February 6, 1982, defendant DESMOND ELLIS told an investigator of the Immigration and Naturalization Service that he was Michael Weir.
8. On or about February 6, 1982, defendant WILLIAM GILROY told an Immigration inspector that all five defendants were travelling together.

COUNT II

The Grand Jury Further Charges That:

On or about the 6th day of February, 1982, at the Whirlpool Bridge, Niagara Falls, New York, in the Western District of New York, the defendant, DESMOND ELLIS, did wilfully, knowingly and unlawfully use and attempt to use a passport issued and designed for the use of another in that the defendant presented a Republic of Ireland passport in the name of Michael Gilmore when applying for admission to the United States; all in violation of Title 18, United States Code, Section 1544.

COUNT III

The Grand Jury Further Charges That:

On or about the 6th day of February, 1982, at Niagara Falls, New York, in the Western District of New York, the defendant, DESMOND ELLIS, did knowingly, willfully and unlawfully make false, fictitious and fraudulent statements and representations, and concealed and covered up a material fact, in a matter within the jurisdiction of the Immigration and Naturalization Service, an agency of the United States, in that the defendant did claim to an investigator at the Immigration and Naturalization Service to be Michael Weir and did identify a Republic of Ireland passport in the name of Michael Weir as belonging to him, whereas, in fact, as the defendant then knew, he was DESMOND ELLIS, not Michael Weir, and said passport in the name of Michael Weir did not belong to him; all in violation of Title 18, United States Code, Section 1001.

COUNT IV

The Grand Jury Further Charges That:

On or about the 6th day of February, 1982, at the Whirlpool Bridge, Niagara Falls, New York, in the Western District of New York, the defendant, EDWARD HOWELL, did wilfully, knowingly and unlawfully use and attempt to use a passport issued and designed for the use of another in that the defendant presented a Republic of Ireland passport in the name of William McKee when applying for admission to the United States; all in violation of Title 18, United States Code, Section 1544.

COUNT V

The Grand Jury Further Charges That:

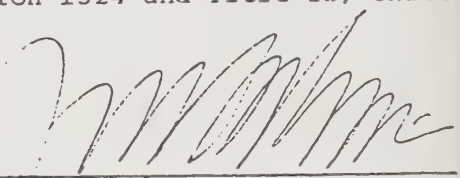
On or about the 6th day of February, 1982, in the Western District of New York, the defendants, WILLIAM O'NEILL, WILLIAM GILROY and JAMES KELLY, did willfully and knowingly attempt to bring into the United States at the Whirlpool Bridge, Niagara Falls, New York, DESMOND ELLIS, an alien, the same being a citizen of Ireland, not lawfully entitled to enter and reside within the United States; all in violation of Title 8, United States Code, Section 1324 and Title 18, United States Code, Section 2.




COUNT VI

The Grand Jury Further Charges That:

On or about the 6th day of February, 1982, in the Western District of New York, the defendants, WILLIAM O'NEILL, WILLIAM GILROY and JAMES KELLY, did willfully and knowingly attempt to bring into the United States at the Whirlpool Bridge, Niagara Falls, New York, EDWARD HOWELL, an alien, the same being a citizen of Ireland, not lawfully entitled to enter and reside within the United States; all in violation of Title 8, United States Code, Section 1324 and Title 18, United States Code, Section 2.

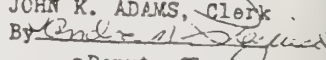
  
 \_\_\_\_\_  
 ROGER P. WILLIAMS  
 United States Attorney

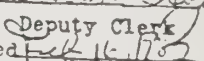
A TRUE BILL:

  
 \_\_\_\_\_  
 Foreman

ATTEST: A TRUE COPY

JOHN K. ADAMS, Clerk

By  Deputy Clerk

Original filed  Feb 16, 1982

A copy of a complaint in *United States of America v. William O'Neill, James Michael Kelly and William Gilroy* dated February 9th, 1982 was also filed with the Board and took the following form:

AO-91  
(Rev. 12/53)

# Complaint

## United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v

WILLIAM O'NEILL  
JAMES MICHAEL KELLY  
WILLIAM GILROY

Magistrate's Docket No. 86

Case No. 82-4547

COMPLAINT for VIOLATION of

U.S.C. Title 8 18

Section 1324 2

BEFORE Edmund F. Maxwell

Name of Magistrate

Room 414, U. S. Court House, Buffalo, NY

Address of Magistrate

The undersigned complainant being duly sworn states:

That on or about February 6, 1982, at the Whirlpool Bridge, Niagara Falls, NY

in the

Western District of New York

(1) WILLIAM O'NEILL, JAMES MICHAEL KELLY, and WILLIAM GILROY

did<sup>(2)</sup> wilfully, knowingly, and unlawfully attempt to bring into the United States from Canada two aliens, to wit, EDWARD HOWELL and MICHAEL WEIR, natives and citizens of Ireland not lawfully entitled to enter or reside in the United States, in violation of Title 8, USC, Section 1324, and at that time did wilfully and knowingly combine and agree with EDWARD HOWELL and MICHAEL WEIR to effect their unlawful entry into the United States in violation of Title 18 USC, Section 2.

And the complainant states that this complaint is based on the statements of U. S. Immigration Inspector Gary Rice and by U. S. Customs Inspector Henry Hall and Thomas Algoe, prepared in the ordinary and usual course of their inspectional duties at the Whirlpool Bridge, Niagara Falls, NY, wherein they reported that on February 6, 1982 WILLIAM O'NEILL, while operating a 1976 Silver Plymouth Fury

bearing Ontario registration LDU672, did unlawfully attempt to bring in or land in the United States EDWARD HOWELL and MICHAEL WEIR; that EDWARD HOWELL did claim to be a landed immigrant of Canada and did present an Irish passport and Canadian Immigration Identification Record, Form IMM 1000 issued in the name of WILLIAM MCKEE and that MICHAEL WEIR did claim to be a landed immigrant of Canada and did present an Irish passport and Canadian Immigration Identification Record, Form IMM 1000 issued in the name of MICHAEL GILMORE. Complainant further states that this complaint is based upon the statement of Customs Inspector Henry Hall wherein he reported that on February 6, 1982, JAMES MICHAEL KELLY, while operating a maroon 1975 Ford Custom 500, bearing Ontario registration SR0019, accompanied by WILLIAM GILROY, did apply for admission into the United States and were referred for a secondary inspection. Complainant further states that this complaint is based upon the statement of Customs Inspector Thomas Algae wherein he reported that on February 6, 1982, he conducted a Customs secondary vehicle inspection on a 1975 Ford Custom 500, Ontario registration SR0019, driven by JAMES MICHAEL KELLY; that the search of said vehicle resulted in the discovery, under the front seat, of the wallet of EDWARD HOWELL, an envelope addressed to MICHAEL WEIR, and further that a search of the luggage contained in the vehicle resulted in the discovery of three Irish passports issued in the names ROBERT MURRAY, EDWARD HOWELL, and MICHAEL WEIR. *Investigation further reveals that William Gilroy is the registered owner of the 1976 Plymouth Fury, Ontario registration LDU672, driven by William Gilroy which occupants were Edward Howell and Michael Weir.*

And the complainant further states that he believes that Gary Rice, Henry Hall and Thomas Algae

are material witnesses in relation to this charge.

FILED  
FEB 17 9 57 AM '82  
U.S. DISTRICT COURT  
W.D. OF N.Y.

*William Gilroy*  
\_\_\_\_\_  
Signature of Complainant.  
Criminal Investigator  
U. S. Immigration & Naturalization Service  
\_\_\_\_\_  
Official Title.

Sworn to before me, and subscribed in my presence 2/9, 1982.  
*5-54 PM*  
*Edward Howell*  
\_\_\_\_\_  
United States Magistrate.

- (1) Insert name of accused  
(2) Insert statement of the essential facts constituting the offense charged

19. Leader testified that in light of these most recent charges against Gilroy, he was concerned that the grievor was involved in activities and associated with people posing a potential risk to Pickering "A" and that he was not prepared to assume this risk. He testified that he did not know whether Ontario Hydro would be a target for the kind of activity mentioned in at least one of the newspaper articles but he did view Gilroy as constituting a "potential threat to [the Pickering "A"] facility by association and by past behaviour". He stated that he believed he had an obligation "to Ontario Hydro, to the surrounding community and to the people of Ontario not to employ that kind of a person at a project of our type". In explaining the earlier re-employment of Mr. Gilroy following the time he spent in Mimico Correctional Centre, he said that a considerable length of time had gone by; Gilroy had served his time and paid his debt to society; and it was the respondent's view that he should be given another chance. He stated that such an incident should not be held against an individual "forever and ever". The evidence reveals there was a period of time after Gilroy had served his jail sentence that Ontario Hydro refused to re-employ him. This provoked a letter dated August 1st, 1978 over the signature of H. Schueler, the then Business Manager of Local 1788. This letter was addressed to Mr. Pickell, Manager of Labour Relations for the respondent and read:

Dear Sir,

On several occasions we presented one of our member's names for employment. Ever so often we received the same reply, 'Under allowance of Article 10.1 of the agreement that name is one of the persons management does not wish to hire at this time.'

If we ask for the reason why, we are referred to head office. You well know the name in question, W. Gilroy.

He has requested that the union find out on his behalf what the reason for such decision is.

Could you kindly get the appropriate person who made that decision to give his reasoning in writing so we may forward same to our member.

Yours very truly,

20. By letter dated August 16, 1978 Mr. Pickell replied to Mr. Schueler indicating that Mr. Gilroy's employment opportunities with Ontario Hydro were equal to those of other members of Local 1788 now that he had served his sentence. The letter reads:

Dear Mr. Schueler:

Further to your letter of August 1, 1978, I have discussed Mr. W. Gilroy's situation with senior management with the hope that we can finally resolve this matter.

There was a period of time during Mr. Gilroy's confinement at the Mimico Correctional Centre where we refused him employment



under the Ministry of Correctional Services Temporary Absence Program. We adopted this position solely on the restraints of the program as they affect the employer/employee relationship. These restraints were identified for your Union at a Standing Committee meeting held on December 3, 1976.

Now that Mr. Gilroy has served his sentence, his employment opportunities with Ontario Hydro are equal to those of other members of your Local.

In accordance with Article 10 – Employment Practices and Procedures, your Local is responsible for supplying our projects and zones with the names of members who are available for employment. If Mr. Gilroy is referred in this manner, he will receive the same consideration given other members.

Yours truly.

21. Mr. Leader testified that because of the information he had received in February of 1982 relating to the new U.S. charges against the grievor, he was led to believe that the respondent had “made a mistake” in re-employing the grievor between 1978 and 1982. He concluded that the grievor was continuing to involve himself in “these activities” and with “those people” and that he was no longer prepared to give him “the benefit of the doubt”.

22. On cross-examination Mr. Leader pointed to the uncertainty and unpredictability of terrorist-like activity. He admitted that he did not know what might prompt the IRA to take action against the respondent but, in his view, “it might happen”. He stated that from time to time the respondent had received threatening letters from persons supporting particular causes. He said that he did not know “what makes their mind work” but that there was some risk in employing Gilroy and, in that context, he had an obligation to protect the respondent’s facility. However, there was no suggestion that persons of Irish descent or purporting to represent the IRA had threatened Ontario Hydro and there was no suggestion that the grievor had in any way threatened Ontario Hydro. The grievor is a competent tradesman and his performance while working for the respondent is clearly not the basis of the respondent’s refusal. Mr. Leader also agreed that the grievor could have been assigned to a crew that had nothing to do with the control room installation but again pointed out that once a person comes on to the site he or she has access to all aspects of that construction site.

23. In support of the contention that the collective agreement obligated the respondent to hire those members of Local 1788 referred to the respondent, the applicant led evidence of the hiring practices of Ontario Hydro under the preceding collective agreement. Mr. Mulhall testified that prior to the current collective agreement Local 1788 directly contracted with the respondent and was not part of the I.B.E.W. Electrical Power Systems Construction Council of Ontario. It was pointed out that under that collective agreement, the employer had the right to “name hire”. This means that Local 1788 provided the respondent with a list of members and was thereafter notified which of those persons on the list the respondent wished to hire.

Representative of the contractual arrangement under this earlier agreement are those provisions found in the collective agreement between Ontario Hydro and Local 1788 for the period July 17th, 1973 to July 16th, 1976. Article 10 of that collective agreement provided:

Article 10  
EMPLOYMENT PRACTICES AND PROCEDURES

- 10.1 The Employer agrees to use employment practices and procedures which are consistent with the maintenance of good Union and Management relations. Therefore, the Employer will co-operate with the Union. To this end, the Employer agrees to notify the Union office of its manpower requirements.
- 10.2 The Union recognizes the public obligations laid upon the Employer in recruiting its construction work force. Depending upon the area where the work is undertaken and the employment situation prevailing in that area at the time of hiring, the Employer's employment policy will be as follows.
- employment of competent resident Local Union members
  - re-employment of former employees who were terminated, and whom the Employer would desire to rehire, and who are unemployed and resident in the area of work
  - recruitment of qualified tradesman applicants from referrals by Canada Manpower Services offices and local union offices
  - employment of local applicants from project area

Appended to that agreement was a letter to Mr. Schueler over the signature of W.J. Chenery, Manager, Construction Labour Relations, which was dated December 5, 1972 and read:

Dear Mr. Schueler:

*Employment Practices and Procedures*

The following sets forth those procedures agreed to by the parties for the clarification of current employment practices and forms part of the Statement of Settlement between Ontario Hydro and Local Union 1788 of the International Brotherhood of Electrical Workers. These practices will become effective as of December 1, 1972.

The following is a proposal for clarifying hiring practices for employment of persons in the Electrician, Lineman and Groundman categories. This proposal does not supersede the provisions of Article 10 of the master portion of the Agreement but clarifies the intent of the last sentence of 10.1 and the third statement in 10.2.

The successful implementation of these recommendations requires the full co-operation of both parties.

Projects and Zones will advise Local 1788 of the IBEW of all manpower requirements in the above Electrical Worker categories, including positions being filled by transfer from other named work locations.

Notification to Local 1788 will be given with as much lead time as possible in order to give the Local time to respond. Local 1788 will supply the Project or Zone with the name of its members available for employment. The Project or Zone will advise Local 1788 which of the named members they wish to hire and such members will be offered employment.

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24. Mulhall testified that after Local 1788 joined the EPSCA Council the employer would simply make known its manpower requirements which would then be filled by the local union. Local 1788 joined the EPSCA Electrical Power Systems Construction Council of Ontario in April of 1981.

25. Finally, it is to be pointed out that the grievor while present at the hearing did not testify on his own behalf.

### SUBMISSIONS

26. On behalf of the trade union and the grievor it was submitted that the effect of sections 700(C) and 701(A) was to render all I.B.E.W. members employees for the purposes of the collective agreement. Thus it was submitted that a refusal to accept a member upon referral constituted a discharge or disciplinary action within the meaning of section 1300(G) of the collective agreement. The Board was also referred to *International Longshoremen's Association, Local 273, et al v. Maritime Employers' Association et al*, 78 CLLC 209, #14,171; *Ecodyne Limited*, [1979] OLRB Rep. July 629; *McGavin Toastmaster Limited v. Ainscough et al* (1975), 54 D.L.R. (3d) p.1; *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1976), 57 D.L.R. (3rd) 199; *Eton Construction Limited*, [1981] OLRB Rep. July 872; and *George Ryder Construction Ltd.*, [1981] OLRB Rep. Dec. 1785. On the basis of this submission it was contended that the employer shouldered the burden of proof to establish discharge for cause and that in determining whether this burden has been met the Board should have regard to the seriousness of the misconduct alleged. It was counsel's submission the respondent had not established cogent evidence that the grievor had engaged in misconduct sufficient to warrant the action complained



of and that, even if the grievor is convicted as charged, the charges are not job related. It was further submitted that the respondent had failed to reserve an untrammelled right to reject members of Local 1788 referred for employment. In this respect, the Board was referred to *Molson's Breweries* (1958) 9 L.A.C. 147 (Cross); *Applied Insulation Co. Ltd.* (1964), 15 L.A.C. 238; *Labatt's* (1964), 15 L.A.C. 351; *Re Waffle and I.B.E.W. Local 773* (1975), 9 L.A.C. (2d) 334; (1977), 17 L.A.C. (2d) 47; and *Board of Education for the City of Toronto* February 15th, 1982, unreported, H.D. Brown. Finally, it was submitted that the grievance is a continuing grievance pertaining to the rejection at Pickering "B" and to all subsequent rejections.

27. Counsel for the employer emphasized that the risk of employing the grievor centered on his tendency to associate with individuals and activities of "a terroristic nature". Counsel emphasized that the grievor appears to be knowingly associating with people who engage in unlawful violent actions. Reference was made to the transcript of the 1975 criminal proceedings; to the 1982 criminal charges; and to the related newspaper reports. It was submitted that the collective agreement does not impose any restriction on the management right to hire and that, therefore, the employer's discretion in this area was unfettered by the collective agreement. Reliance was placed on the *Board of Education for the City of Toronto* case cited above. Alternatively, it was submitted that if the employer's discretion in this respect was not unbridled, the standard to be applied to this type of management responsibility was to be based on the words "reliable and competent" set out in section 700(C). And as long as a board of arbitration was satisfied that the employer had based its decision on reliability or competency, the board of arbitration could not substitute its opinion for that of management's. In this respect, counsel referred to section 1301(B) restricting the jurisdiction of a board of arbitration and precluding it from exercising a responsibility or function of the parties. It was counsel's submission that the respondent was not obligated to hire any particular individual as long as it was prepared to hire I.B.E.W. members generally. It was also argued that much more specific language in the collective agreement would be required to obligate the employer to hire any particular member referred to it by the trade union. It was emphasized that the employer must have a discretion in the hiring process otherwise it would be required to hire employees whom it had recently discharged for cause. Finally, it was submitted that the grievor in fact presented a risk to the respondent sufficient to justify the action complained of regardless of the standard of review thought appropriate by this Board. In this respect, the Board was referred to *Oshawa General Hospital and Ontario Nurses' Association* (1981), 30 L.A.C. (2d) 5 (Adams).

### REASONS

28. The first issue before the Board relates to the extent of discretion in the respondent company to hire employees under this collective agreement. The relevant provisions of the agreement are set out above and the principal provision is section 701(A). The paragraph begins by noting that employment and layoff of tradesmen and apprentices "shall be carried out on the following basis and sequence". It then goes on to provide that the employer will hire only members of the I.B.E.W. and that the EPSCA office will request the appropriate local union office "for the certified tradesmen and apprentices required".



29. Section 701(A)(i) does not specifically state that the employer will hire any particular member of I.B.E.W. but, on the other hand, the commitment to request the tradesmen required from the trade union can reasonably be construed as a commitment to hire those tradesmen referred. It could also, but less reasonably we think, be construed as agreeing that the local union act on behalf of the employer in hiring the available tradesmen. On the other hand, the respondent asserts that the right to hire is a significant management right which should be fettered by clear intent and custom. Against the submission, it is useful to consider the remainder of the language used in paragraph (ii). Section 701(A)(ii) goes on to state that the employer shall be afforded "the right" to employ certified tradesmen as are available. "[i]f the local union is unable to furnish certified local union or travel card members to the employer within three (3) working days of the time" it receives a request from the employer. In our view, it is more difficult to infer from this language the unfettered right of the employer to refuse to hire those certified local union tradesmen referred within the three days stipulated. The sentence positively enshrines a right to employ certified tradesmen as are available *after* the three days have elapsed suggesting that such a right does not exist prior to the expiration of the three days. Moreover, an unfettered discretion to hire members referred to the employer could substantially undermine the hiring hall procedure enshrined in this section. An unreviewable discretion to reject in combination with the three day time limit would grant the respondent access to non-member forces any time it wished. The other relevant portion of section 701(A)(ii) is the commitment that travel card members and permit holders may be replaced by local union members after three working days' notice to the employer provided the tradesman to be replaced has worked a minimum of one week. This commitment, while not using the imperative language "shall", appears to place the discretion of replacement in the local union's hands provided three days' notice is given to the employer. If the employer retained the unfettered discretion to reject in this instance there would be little need to stipulate a notice period and create the proviso that the tradesmen to be replaced must have worked a minimum of one week. It is also relevant that the collective agreement does not specifically embrace a management rights clause that deals directly with the act of hiring.

30. The agreement does, however, makes mention of certain unspecified responsibilities and functions of the parties and precludes a Board of arbitration from substituting its discretion for that of the parties. Unfortunately, that wording cuts both ways in the sense that either party can claim its application to the issue before this Board. The employer can claim that it is its function to hire and the union can claim interference with its function to refer. For the sake of completeness we also note the appendix pertaining to Local Union 1788 and Ontario Hydro employees seems to envisage that Ontario Hydro may hire employees who must subsequently become union members. See Section 1(A). Section 1(D) then obligates the employer to require employees "at the time ... employed" to sign a Local Union 1788 dues checkoff authorization. And Section 1(E) makes mention of Local 1788 making arrangements with "new employees for them to join Local Union 1788". However, neither of the parties focussed their representations on the wording of the appendix and there was no suggestion that the appendix detracted from or in any way affected the obligations and rights of the respective parties under Section 701. Indeed, the evidence revealed that Local 1788 administered a hiring hall in relation to Ontario Hydro and that Ontario Hydro and EPSCA made requests for manpower to the local union pursuant to the

procedures laid down in Section 701 and that members were assigned to work either in relation to a request or a replacement pursuant to the same section. However, the wording of the appendix is certainly inconsistent with any suggestion that the applicant unions do the hiring for the employer. The wording also cuts against the trade union's contention that members in the hiring hall have the status of employees under the agreement and that the employer has retained no discretion in the area of hiring. Without any assistance from the parties on its application, the Board is unable to give the appendix any further weight.

31. One response to the first issue (i.e. the extent of employer discretion) might be to require a specific and unequivocal encroachment to the management right to hire before being satisfied that the employer has given up this important responsibility. This seems to have been the approach in *Re International Union of Operating Engineers, Local 944 and Labatts Ontario Breweries Limited* (1964), 15 L.A.C. 351 (Reville) and in *Re Operating Engineers and Molsons Brewery (Ontario) Limited* (1958), 9 L.A.C. 147 (Cross). However, we note in the *Molsons Brewery Limited* case the collective agreement provided that "if within five days the union could not supply applicants who were "satisfactory to the company" the company could then arrange to hire men elsewhere. The Board concluded that the phrase "satisfactory to the company" clearly implied the right of the company to exercise its own judgment in considering whether to take on the persons referred to it by the trade union. In the *Labatts Ontario Breweries Limited* case the agreement provided that "any employee so furnished would be fit and suitable to perform the services required". From that language the board of arbitration concluded that the employer retained the right to determine an employee's qualifications, provided it acted judicially and bona fide. We also observe that neither case pertained to the construction industry.

32. The other approach, and the one we prefer, is to recognize that this collective agreement was negotiated in the context of the construction industry and that the words of the collective agreement in issue pertain to one of the hallmarks of the construction industry, the hiring hall. The nature of a hiring hall is to a large degree a function of two labour relations realities in the construction industry. The first is the fact that this collective agreement and others in the construction industry generally pertain to "certified tradesmen or journeymen". The word "journeymen" is said to have originated in the railroad industry where a journeyman was considered a totally competent craftsman who could take his tools and apprentice and travel to remote parts of a railroad to perform his work as a skilled craftsman essentially on an unsupervised basis. A "journeyman" or "tradesman" need not be described as a "skilled journeyman" or "skilled tradesman" because the word journeyman or tradesman already denotes the highest level of skill in a trade. In short, the term journeyman or tradesman refers to a person who can work with little or no supervision and who represents the highest level of proficiency in a craft. See *Swinerton and Walberg Company* (1977), 68 L.A.C. 940 (Schedler). The notion of "certification" pursuant to legislation requiring the training and certification of tradesmen is today a further guarantee of proficiency. Thus, persons who constitute certified tradesmen or journeymen and who are referred to an employer by way of a hiring hall provision cannot be considered untested and untried potential hires "from the street" as in a manufacturing or service context. Because journeymen and tradesmen are expected to have a minimum level of proficiency, an

inference that the employer has agreed to fetter its hiring discretion, or subject it to arbitral review, is not *prima facie* an unreasonable conclusion.

33. The second point giving rise to the nature of a hiring hall is the peculiar relationship between employer and employees in the construction industry as was discussed in the case of *R M Hardy and Associated Limited and Teamsters, Local Union 213*, [1977] 2 Can.L.R.B.R. 357 where the chairman, Professor P.C. Weiler, observed the following:

Most of the workmen in the construction industry are skilled tradesmen, usually having obtained tradesmen's qualification certificates after years of apprenticeship. Each of the distinctive trades has its own craft union, which may have a century-old tradition of representing its members in collective bargaining with the contractors who employ members of that trade. But most building trade unions have another role besides the customary representation of employees in collective bargaining: the hiring hall function. The reason is the highly cyclical nature of employment in the construction industry – stemming both from the rhythm of individual projects and the intermittent and erratic pattern in which major construction investments are brought on stream. In response to that pattern, contractors – whether general or specialty contractors – normally do not maintain a regular work force. They may retain a nucleus of key employees, but the bulk of their workmen are recruited as and when they are needed for a specific project for which the employer has obtained a contract. Where do they get these tradesmen? Through the union which represents that craft. The union office keeps a list of available tradesmen; the contractor phones the union office for certain kinds and numbers of workmen; and the crew is then dispatched through the union hiring hall to the job site. *In effect, the trade union performs the basic personnel function in the construction industry, by allocating jobs among the members of the work force.* Any one tradesman may be employed by a number of contractors in a number of areas in any one year. Besides paying the immediate take-home wages to the tradesmen on the job, the contractor also forwards directly to the union hourly contributions for health and welfare, vacation, and pension benefits, and these funds are administered by the union for its members. And the consequence is that the primary and enduring relationship in construction is between craft unions and tradesmen-members, not between employer and employee.

[our emphasis]

34. It is against the background of these observations that one must consider the various cases dealing with the effect of hiring hall provisions on employment status. It has been clearly established that persons in a hiring hall and not yet in the active employ of an employer can seek relief under a collective agreement and be awarded damages for the breach of a union hiring hall provision. See *Re Blouin Drywall*



*Contractors Limited and United Brotherhood of Carpenters and Joiners of America, Local 2486*, [1975] 57 D.L.R. (3d) 199 and *McKenna Brothers Limited and Plumbers Union, Local 527* (1975), 10 L.A.C. (2d) 273 (Shime). See also *Eton Construction Limited*, [1981] OLRB Rep. July 872. It has also been held that the refusal of a local union to refer tradesmen can amount to an unlawful strike of such tradesmen even though they are not in the active employ of the employer in question. See *Local 273, International Longshoremen's Association v. Maritime Employers Association*, [1979] 1 F.C.R. 120. On the other hand, we note the apparent need of the Legislature to enact section 69 of the Act in order to create a duty of fair representation for those in the hiring hall but not yet employees within the meaning of section 68. But whatever the legal significance of section 69, the court cases do suggest that in the construction industry and in like industries, there is in law, and without specific contractual wording to the contrary, a very close relationship between being in a hiring hall and having employment status. Precisely, how close will depend on the circumstances of any particular case.

35. From this perspective, therefore, it is not surprising to learn that in those arbitration cases considering the refusal to hire a referral in the construction industry an unfettered employer discretion to hire has been honoured by a board of arbitration usually in the face of very specific contractual language retaining a discretion to hire or refuse to hire in the employer. In *Re Columbia Bitulithic Limited and International Union of Operating Engineers, Local 115* (1977), 17 L.A.C. (2d) 47 (Chertkow) the union specifically recognized the employer's right to "name - request a former employee". Similarly, in *Re Waffle Electric Limited and International Brotherhood of Electrical Workers, Local 773* (1975), 9 L.A.C. (2d) 334 (Kruger) the contractor was obligated to take the first man on the out-of-work list but "had his choice for the second employee [he wished] to have at that time from the next foremen listed on the out-of-work list". In *Newark Newspaper Publishers Association* (1963), 43 L.A. 245 (Schmertz) the employer retained "the right to reject any job applicant referred to it by the union". In the *Board of Education for the City of Toronto and Toronto-Central Ontario Building and Construction Trades Council* (1982), March 30th, 1982 (H.D. Brown) the contract acknowledged that "the employees supplied by the union who, in the opinion of the board, are not suitable or qualified may not be hired". Similarly, in *Alyeska Pipeline Service Company* (1981), 76 L.A. 172 (Eaton) the contractor retained "the right to reject any job applicant referred by the union". Parallel language existed in the contracts in *Potashnyck Construction Company* (1981), 77 L.A. 893 (Richardson) and *Barnard and Birk Inc.* (1980), 74 L.A. 550 (Taylor). Cases where specific language retaining an unfettered right to hire did not exist and where arbitral review took place are: *Re International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and Applied Insulation Company Limited* (1964), 15 L.A.C. 238 (Reville); *Newark Newspaper Publishers Association* (1963), 43 L.A. 245 (Schmertz); and *Pacific Maritime Association* (1978), 70 L.A. 422 (Hoffman). Also of relevance in this particular case is the fact that the prior collective agreement between the parties set out above clearly acknowledged in section 10.2 the discretion in the employer to re-employ former employees and the "name hire" system then in operation was specifically embodied in a letter dated December 5th, 1972 appended to that agreement. The collective agreement between the parties that is in issue before this Board contains no such specific language and contains no clear acknowledgement of a discretion in the employer to hire or reject those certified tradesmen referred to it. Accordingly, on the



wording of this collective agreement and construing it in light of construction industry practices, we have come to the conclusion that the employer does not have an unbridled right of rejection in dealing with certified tradesmen referred to it pursuant to section 701. It has given up the broad discretion it might otherwise have had in agreeing to this particular hiring hall provision.

36. But does this conclusion mean that the employer is obligated to hire all tradesmen referred regardless of whether or not they are in fact reliable and competent? Indeed, does this conclusion mean that the employer is obligated to re-employ a person it has previously discharged for cause? Clearly, the right of discharge or discipline specifically acknowledged in section 13 of the collective agreement would have little force or effect if the employer was obligated to rehire an employee it had previously discharged. It would therefore be reasonable to infer a right to reject a person previously dismissed by the employer. But must all other tradesmen referred be hired? What if a referred tradesman is intoxicated or from past experience believed to be unreliable or incompetent notwithstanding his certification? Were we to hold such an obligation existed, the employer would be required to employ the individual first and then immediately terminate on the basis of the documentation it had before it. Reading the collective agreement as a whole, it is our opinion that in agreeing to Section 701 the parties did not intend such a result. The requirements of section 701 and the acknowledgement of the parties in section 7, paragraph C that reliable and competent union members will be referred and employed are best met by implying a right in the employer to reject persons it believes to be unreliable or incompetent or otherwise unqualified subject to acting reasonably, in good faith and without discrimination. We point out that Section 1301 makes clear that "an employee" who has been discharged or otherwise disciplined for cause may take advantage of the "just cause" standard required by that section. On the facts before us, the grievor, Mr. Gilroy, was a tradesman referred for employment but actual employment was not forthcoming. While the parties did not specifically agree to an unbridled right in the employer to reject, they also did not agree to subject rejections to the section 1300 standard of "just cause". Rather, the act of hiring under this construction industry agreement is very similar to the act of promotion in an industrial context. With respect to the latter function, and in order that seniority rights not be capable of unilateral abrogation by an employer, arbitrators have inferred the contractual obligation that management's responsibility to assess employee qualifications be exercised reasonably, in good faith and without discrimination. See particularly *Re United Mine Workers of America, Local 13031 and Canadian Industries Ltd.* (1948), 1 L.A.C. 234 (Roach); *Re Reynolds Aluminum Co. Canada Ltd. and International Molders and Allied Workers Union, Local 28* (1974), 5 L.A.C. (2d) 251 (Schiff); and *Re H.E.P.C. of Ontario and Office and Professional Employees' International Union* (1976), 11 L.A.C. (2d) 36 (Beatty). As the arbitration board in the *Reynolds Aluminum Co. Canada Ltd.* case, *supra*, at page 254-5 put it:

In the ordinary exercise of management functions employers may determine in the first instance what specific qualifications are necessary for a particular job and what relative weight should be given to each of the chosen qualifications. After the employer has made the determination, arbitrators should honour the managerial decisions except in one or both of two circumstances: First, the

employer in bad faith manipulated the purported job qualifications in order to subvert the just claims of employees for job advancement under the terms of the collective agreement. See *Re United Brewery Workers, Local 173, and Carling Breweries Ltd.* (1968), 19 L.A.C. 110 (Christie); *Re Textile Workers Union and Lady Galt Towels Ltd.* (1969), 20 L.A.C. 382 (Christie); *Re Canadian Trailmobile Ltd. and U.A.W., Local 397* (1973), 2 L.A.C. (2d) 13 (Brown). Secondly, whether or not the employer had acted in good faith, the chosen qualifications bear no reasonable relation to the work to be done. See *Re U.A.W., Local 707, and Ford Motor Co. of Canada Ltd.* (1970), 21 L.A.C. 61 (Weatherill); *Re Oil, Chemical & Atomic Workers, Local 9-14, and Polymer Corp. Ltd.* (1972), 24 L.A.C. 277 (O'Shea).

37. Because a hiring hall provides the same "job security" in the construction industry as seniority does in a non-construction context, the two institutions are equally important and deserving of the same construction and interpretation by arbitrators. An unbridled management discretion to hire in the face of a hiring hall clause such as exists in this contract would be as undermining of that provision as would be an unbridled power to review qualifications to seniority rights in the unusual industrial collective agreement. On the other hand, full arbitral review as in discipline cases would not accord with Article 13 and be subject to the concern of excessive arbitral intervention. Accordingly, the approach outlined in *Reynolds Aluminum* is equally applicable to the response of employers to hiring hall referrals without specific wording to the contrary.

38. The issue remaining before us is whether the respondent acted reasonably, in good faith and without discrimination in refusing to hire the grievor who had been referred to it for employment at the various locations noted above. The union bears the onus of proof in establishing that the employer acted improperly. This is not a discipline case. The evidence indicates that the grievor voluntarily terminated his employment with Ontario Hydro on February 5th and that, based on certain newspaper reports and inquiries, the respondent believed the grievor to have been arrested on February 6th while crossing the border from Canada into the United States. The respondent further believed that the grievor had been charged under U.S. Immigration laws with conspiracy to smuggle aliens into the U.S. It also understood from newspaper reports that the apparent purpose of the grievor and his colleagues was to purchase arms and take or ship them to Northern Ireland. Newspaper reports also linked two of the grievor's colleagues with the assassination of Lord Mountbatten on August 27th, 1979, who was killed by an explosion alleged to be effected by an Irish Republican army bomb. Copies of documents purporting to be charges against Gilroy in the District Court of the United States for the Western District of New York were obtained by Ontario Hydro and filed with the Board. At no time did Mr. Gilroy take the stand and deny that these charges had been laid against him and are currently outstanding. The evidence also reveals that the grievor at no time provided the respondent with any explanation of his conduct on February 6th in an attempt to alleviate the employer's concern. Finally, the evidence establishes that the grievor served a jail sentence at Mimico Correctional Centre from June 27th, 1975 to October 25th, 1975 having been

found guilty of attempting to export 15 semi-automatic military rifles contrary to the Export and Import Permits Act, arms which were intended to be sent to Ireland by way of the United States.

39. Mr. Leader, Construction Industry Manager for Pickering "B", was concerned about the uncertainty and unpredictability of terrorist-like activity and, having regard to the grievor's previous involvement in unlawful conduct supporting the IRA, he was not prepared to assume the risk of employing Gilroy in close proximity to an operational nuclear generating station. On the other hand, the grievor has worked on and off for Ontario Hydro since 1967 and his employment has been uneventful in terms of the kinds of concerns that led Mr. Leader to object to his rehire. Unfortunately, the grievor did not testify before the Board in order to explain his conduct on February 6th or his association or lack of association with the Irish Republican Army in Ireland. However, his counsel took the position that even if convicted of the charges against him, the conduct is unrelated to his job.

40. We are not applying a standard of "just cause" for termination but rather, at the highest, a standard of reasonableness and it is for the applicants to establish that the employer acted unreasonably. The sabotage or interference with the workings of a nuclear generating station could be catastrophic from a public safety point of view and it is this feature of a nuclear site that gives it a high "ransom value". The respondent is also a major public sector employer directly accountable to the public of this Province and we can take notice of the public's general interest in and anxiety over safety issues relating to nuclear energy. There is therefore ample justification for an employer such as the respondent to be concerned about security at the Pickering and Bruce locations. Moreover, while security precautions of a general nature taken by the employer at these locations do not appear particularly rigorous, this lack of rigour does not demand that the employer ignore security issues brought to its attention.

41. The grievor appears to have been charged with a serious criminal offence in the United States, linking him to a notorious organization that, regardless of the merits of its cause, is known to engage in violent unlawful acts. History has shown that such violent activities are in themselves unpredictable in timing, location and scope. The grievor was previously convicted of an unlawful act obviously intended to assist similar activities and now appears to have been charged with a related offense. We also cannot accept that the act of rehiring the grievor after he had served his earlier jail sentence constitutes an admission by this employer that such conduct and any association with the IRA are unrelated to the grievor's job. He was not rehired immediately on his release from jail and was employed only after considerable dialogue between the respondent and his union. His rehire is therefore equally consistent with Mr. Leader's view that he had paid his debt to society and that the employer assumed he would no longer engage in such conduct.

42. After considerable reflection, we have come to the conclusion that, in relation to Pickering "B" and Bruce "B" locations, the charges, if established, could be job related and that the laying of charges provided the respondent with reasonable justification to refuse to hire the grievor at those two sites. The applicants have not established on evidence before us that the respondent's conduct on those two occasions was unreasonable, discriminatory or taken in bad faith. Violence of the type referred to



in the newspaper reports is difficult to predict or delimit. Given the degree of risk associated with an operational nuclear power generating station and the inherent public concern in such matters, it cannot be said that the grievor's possible assistance by unlawful means of persons or an organization having a potential for such violence is an irrelevant or unreasonable consideration for the respondent to have taken into account. While the probability of the grievor acting improperly may be small, the consequences of such misconduct would be catastrophic. The grievor was not called as a witness to provide the details of his activities in February and to enlighten the Board on the actual risks associated with his re-employment. We are also of the view that the obligations of an employer to an employee charged with a job related criminal offence as detailed in the *Philips Cables* case and applied in *Oshawa General Hospital* are not properly demanded in re-hire or rejection situations given the language of this collective agreement. Such standards are a product of discriminating arbitral review produced by a "just cause" clause and would only be applicable if this matter was being considered under section 13.

43. Counsel for the applicants argued that the employer had acted on mere suspicion and hearsay and that the effect of not hiring the grievor interfered with his freedom of association. We too are concerned about the absence of direct evidence pertaining to the grievor's alleged unlawful conduct on February 6th, 1982. However, the employer took reasonable efforts to investigate the situation and, having regard to the standard of review in cases of this kind, produced acceptable evidence before this Board. Equally important is the fact that the grievor did not testify before the Board. He therefore did not deny the existence of the charges by direct evidence nor did he deny the claimed associations with the IRA. Negative inferences can therefore be drawn on both of these aspects of the case. Furthermore, this is not a case where a person has been dealt with merely because of an association with others. The grievor has been charged in the United States with the unlawful assistance of certain persons and this alleged assistance may be directly related to the commission of violence abroad. He was convicted in Canada of unlawfully assisting such activities on an earlier occasion. The commission of unlawful acts in Canada and the United States (if subsequently established) to some extent blurs a clear separation of violence abroad and the grievor's reliability in Canada. In our view, more than mere association is in issue and of concern to this employer. The application is therefore dismissed insofar as it relates to the two nuclear sites.

44. The submissions reveal that the parties were "poles apart" over the legal effect of the hiring hall provisions of this collective agreement. In considering the employer's response to the referral of the grievor of the two nuclear sites, the Board has now outlined the appropriate contractual standard against which this employer's hiring decisions are to be assessed where the hiring hall provision has application. Because this is the first time the matter has been determined for these parties, the Board has decided to remit this matter back to the parties to consider the implications of this award for the non-nuclear sites. Should the parties be unable to resolve all outstanding issues, submissions may be made to the Board.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

I concur with the result insofar as it deals with the two nuclear power generating stations.



### DECISION OF BOARD MEMBER F. S. COOKE;

1. I agree with the majority decision as to the employment relationship of the members of Local 1788, I.B.E.W. and Ontario Hydro.
2. I am unable to agree with the majority on the application of the facts before us.
3. There was no indication that Hydro was concerned about security matters at the time of Gilroy's conviction and confinement for breach of the laws of Canada.
4. The letter of Hydro (Exhibit 15 in this case) dated August 16, 1978 clearly outlines this.

Mr. Hank Schueler  
 Business Manager, Local 1788  
 International Brotherhood of Electrical Workers  
 3500 Danforth Avenue  
 SCARBOROUGH, Ontario M1L 1E1

Dear Mr. Schueler:

Further to your letter of August 1, 1978, I have discussed Mr. W. Gilroy's situation with senior management with the hope that we can finally resolve this matter.

*There was a period of time during Mr. Gilroy's confinement at the Mimico Correctional Centre where we refused him employment under the Ministry of Correctional Services Temporary Absence Program. We adopted this position solely on the restraints of the program as they affect the employer/employee relationship. These restraints were identified for your Union at a Standing Committee meeting held on December 3, 1976.*

*Now that Mr. Gilroy has served his sentence, his employment opportunities with Ontario Hydro are equal to those of other members of your Local.*

In accordance with Article 10 - Employment Practices and Procedures, your Local is responsible for supplying our projects and zones with the names of members who are available for employment. If Mr. Gilroy is referred in this manner, he will receive the same consideration given other members.

Yours truly,

5. There were no assurances asked by Hydro.
6. The evidence of Hydro given to this Board about its security practices indicate to me that security on its construction sites and for that matter movement from

its construction sites to its operational sites at its Pickering and Bruce locations is of very low concern.

7. Any person showing up for work attired like a construction worker and wearing a hard hat is not challenged at a manned gate at normal starting time.

8. A construction worker moving from the construction area to the operational area passes a manned security station where the main function was described as being to see that dosimeters were distributed and in some cases where a foreman might pick up dosimeters for his crew.

9. This description does not allow me to come to the conclusion that the charges against the grievor are job related and I am unable to conclude that in these circumstances Hydro has acted reasonably.

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**0502-82-R** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Local 641, Applicant, v. **Ottawa Truck Centre**, a division of Kemptville Truck Centre Limited, Respondent.

**Reconsideration – Sale of a Business – Prior decision holding no transfer but expansion of existing business – Issue of whether transfer of franchise constituting sale not determined by decision – Board finding no grounds for reconsideration**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. W. Murray and B. L. Armstrong.

**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER J. W. MURRAY; January 28, 1983**

1. By letter dated December 1, 1982 the representative of the applicant requests reconsideration of the Board's decision dated November 16, 1982 (reported at [1982] OLRB Rep. Nov. 1704).

2. The Board will generally reconsider a decision only where the request to do so discloses the possibility of substantial and material new evidence or arguments which were not, by the exercise of due diligence, reasonably available to the party at the time of the hearing. The request of the applicant's representative discloses no such possibility and is, in effect, a request to reargue or appeal its application. In these circumstances, the Board does not deem it appropriate to reconsider its decision.

3. It should perhaps be emphasized, however, that the Board's decision in the instant case is not, as the union's representative suggests, a determination of the merits of the effect of the transfer of a franchise for the purposes of section 63 of the Act. The Board has specifically found that the Matheson franchise was not transferred, but was terminated as a going concern. The respondent merely expanded its own pre-existing

business. The issue of whether the transfer of a franchise is the sale of a business for the purposes of section 63 of the Act remains to be determined in a case where those facts are specifically found. The decision in the instant case should not be viewed as a precedent for the purposes of that issue.

4. For the foregoing reasons, the request for reconsideration is denied.

#### **DECISION OF BOARD MEMBER B. L. ARMSTRONG;**

As I indicated in my dissent I would have found that a franchise was transferred to the respondent. I therefore cannot concur in the decision to deny reconsideration.

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#### **0473-82-R NDT Management Association, Applicant, v. Quality Control Council of Canada, Respondent**

**Accreditation** – Unit sought described as “all employers of non-destructive testing technicians, trainees and helpers” – Whether not appropriate as creating new craft unit – Requested unit including all sectors except residential – Minister’s designations excluding respondent council and collective agreement from province-wide bargaining regime – Inclusion of ICI sector not impediment to accreditation in circumstances

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members W. G. Donnelly and S. Cooke.

**APPEARANCES:** *W. G. Phelps and G. H. Grossman for the applicant; no one appearing for the respondent; no one appearing for the employer-intervenors.*

#### **DECISION OF THE BOARD; January 26, 1983**

1. This is an application for accreditation wherein the applicant seeks to be accredited as the bargaining agent for certain employers who have a bargaining relationship with the respondent council of trade unions. The respondent is party to a collective agreement with the applicant which was effective from December 1, 1980 to November 30th, 1982.

2. Having regard to the materials filed before it, the Board is satisfied that more than one employer who is affected by this application is bound by this collective agreement. Accordingly, the Board finds that it has the jurisdiction to entertain this application for accreditation under section 125 of the *Labour Relations Act*.

3. The applicant association is an unincorporated association of employers. The constitution of the organization was adopted by the three members on October 30th, 1974 by signing the constitution in the City of Toronto. Subsequently, every member of the association has signed and adopted both the constitution and By-Law No. 1 of the association made pursuant to the constitution dealing primarily with membership, the



Board of Directors and Officers of the association, together with certain other matters affecting the operation of the association. Having regard to this material, the Board finds that the applicant is an employers' organization within the meaning of section 1(1)(d) of the *Labour Relations Act* and it is satisfied that the applicant fulfills the requirements of section 127(3) of the Act.

4. The applicant filed in support of its application 18 documents entitled "Authorization". These documents authorize and appoint the applicant association to bargain on behalf of the employer with the respondent, Quality Control Council of Canada, in all of the provinces and territories of Canada. Further, the document also authorizes the association to make application to become, amongst other things, accredited in any or all sectors of the construction industry under the applicable labour legislation in each of the provinces or territories as may be deemed appropriate by the applicant association. These documents are signed and dated by each of the 18 employers on whose behalf the authorizations were filed. The applicant also filed a duly completed Form 88, Declaration Concerning Representation Documents, Application for Accreditation. The Board is satisfied that the evidence of representation meets the requirements set out in section 120 of the Board's Rules of Procedure, and the Board is further satisfied that the individual employers on whose behalf the applicant has submitted evidence of representation have vested appropriate authority in the applicant to enable it to discharge the duties of an accredited bargaining agent.

5. The applicant has applied for a unit of employers as follows:

"all employers of non-destructive testing technicians, trainees and helpers for whom the respondent has bargaining rights in the Province of Ontario in the industrial, commercial and institutional sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector of the construction industry."

The respondent council of trade unions did not file an appearance in this matter, however, by telegram, the secretary of the council of trade unions informed the Board that they were supporting the application by the applicant association. The above described unit of employers reflects in part article 1.01 of the collective agreement in force between the applicant and the respondent. That article is entitled "Recognition" and it reads as follows:

"The Employer recognizes the Council as the sole and exclusive bargaining representative for all Non-Destructive Testing Technicians, Trainees and Helpers in the employ of the Employer within the scope of this Agreement save and except office and sales staff, and persons above the rank of working supervisor."

6. The respondent, Quality Control Council of Canada, is a council of trade unions made up of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the United Association), and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (hereinafter referred to as



the Boilermakers). In order to understand the significance of the recognition clause in article 1 of the collective agreement it is necessary to look at the recitals which introduce the agreement. These recitals are as follows:

“WHEREAS the Employer’s business involves non-destructive testing and the employment of persons skilled and qualified to perform the same, and

WHEREAS the nature of the work and the size and scope of the Employer’s business requires that persons employed by the Employer be available to perform work where and when such work may be requested by owners and contractors; and

WHEREAS the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (hereinafter referred to as the “affiliated Unions”) wish to negotiate and administer this Agreement through the Council and for that purpose have constituted the Council and empowered it to act as agent for each and both of them; and

WHEREAS the Employer recognizes for the purposes of this Agreement the formation by the affiliated Unions of the Council and agrees to deal with the Council as the agent of the affiliated Unions in negotiating and administering this Collective Agreement; and

WHEREAS the parties hereto desire that persons trained to perform non-destructive testing work may be admitted to the appropriate affiliated Union, and that the said affiliated Union should have jurisdiction over such persons; and

WHEREAS the work of the Employer is carried out in many places in Canada so that it is essential that the Employer’s personnel be available to work promptly when required throughout Canada.

NOW THEREFORE this Agreement witnesseth, and the parties aforementioned hereto mutually covenant and agree together as follows: ...”

7. The applicant association made certain representations to the Board concerning the nature of the non-destructive testing industry, and how the nature of the industry, together with the collective agreement on which this application is based, give rise to the appropriateness of the unit of employers requested in this matter. Since the unit of employers requested raises two unusual problems, it is necessary to outline some extensive background in order to establish the appropriateness of the requested unit of employers. What is peculiar about the unit requested, is that it refers to “non-destructive testing technicians” which would appear to be a classification of employees,

or perhaps a craft, which has not heretofore been recognized as a construction craft by this Board. Further, it will be noted that the application requests the unit cover all sectors of the construction industry except the residential sector of the construction industry and that, of course, would include the industrial, commercial and institutional sector of the construction industry which, of course, is subject to the province-wide bargaining regime outlined in section 137 and following of the *Labour Relations Act*. This gives rise to the obvious question of how the present accreditation application would relate to the existing scheme of province-wide bargaining.

8. The purpose of non-destructive testing is to find cracks in metals. These cracks result from the stresses created in metal during welding operations or from simple metal fatigue after extended use. As the name implies, non-destructive testing involves testing without destroying the material being tested, and therefore, it uses a variety of techniques such as radiography (similar to x-ray techniques), ultrasonic analysis, iron filing patterns and penetrating dyes. These techniques disclose cracks or faults in the material. The tools used include portable x-ray cameras, portable ultrasonic devices, portable materials for magnetic particle or liquid penetrant analysis, mobile dark rooms for developing x-rays and specialized vehicles to transport these tools, including the transporting of certain radio-active materials. Non-destructive testing work performed on construction projects includes work on pipelines, gas plants, petro-chemical installations, heavy water plants, oil sands plants, reconstruction of pulp mills, refineries and mining installations, bridge construction, dam construction, watermain and subway construction. Obviously, the work is very specialized and the testing contractor is only on a construction job site for very specific times during which the testing of the materials can be performed.

9. The jurisdiction over non-destructive testing work has been claimed by both the United Association and the Boilermakers' Union. The claim by the United Association relates to piping systems whereas the claim of the Boilermakers relates to the testing on pressure vessels. Given the nature of the specialized business of non-destructive testing employers, it is easy to see that on a job site which involves both piping systems and pressure vessels, these two historical claims by the two trade unions could lead to extensive and complicated jurisdictional claims being made by each of the two unions claiming jurisdiction in this area. Thus, by forming a council, the respondent, Quality Control Council of Canada, the two unions claiming jurisdiction have eliminated the possibility of jurisdictional disputes arising over the performance of particular work by the two constituent trade unions. Indeed, apparently half of the employees of an employer join the United Association and the other half join the Boilermakers. However, they all work without restriction on either piping or pressure vessels. There are two other important characteristics of the non-destructive testing industry and the collective agreement upon which this application is made. First, it is the undisputed position of the applicant in this matter that new employees are not hired through the union hiring halls of either of the constituent trade unions in the council of unions. Rather, employees tend to be trained specifically in the skills of non-destructive testing. In accordance with this they are required to pass tests set up by the Canadian Standards Bureau in radiography and ultrasonics. These skills are not typically skills exercised by the trades which claim the work, but are quite clearly specialty skills learned as employees of a non-destructive testing company. The other important characteristic is that the collective agreement itself is not an agreement which refers to

or picks up terms of other collective agreements. Rather, it is in fact a specialty agreement which is negotiated by the parties to that agreement and sets specific wage rates for the classifications of non-destructive testing technicians of various qualification. In this regard, a reference should be made to schedule "B" of the collective agreement relating to *inter alia* the Province of Ontario which sets out the following classifications with various wage rates:

#### "SCHEDULE "B"

B.01 Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland

B.01 'Certificates' shall mean a CGSB Certificate in any of the following:

- Aircraft Structures
- Other Junior (Tech 1)
- Magnetic Particle (Tech II-M.P.)
- Liquid Penetrant (Tech II-L.P.)
- Eddy Current (Tech II-E.C.)
- C.W.B. Certification (Tech II)

Senior Technician  
(Technician II – Radiography or Ultrasonics)

- with 3 Certificates
- with less than 3 Certificates
- unchargeable time

Junior Technician  
(Technician I – Radiography or Ultrasonics)

- with 2 Certificates
- with less than 2 Certificates
- unchargeable time

Trainee

- with 1 Certificate
- no Certificates

Within each classification (i.e. – Level II, Level I, Trainee) when the Employer is laying off from a project it will not lay off employees for the reason that they are over-qualified."

10. In view of the foregoing history and explanation of the background up to the present period, we are of the view that the request by the applicant to describe the unit of employers as all employers of non-destructive testing technicians, trainees and helpers is indeed an appropriate way of describing those affected by this application. In so doing we are not creating a new craft "unit" for the construction industry. That decision can only be made by a panel of the Board dealing with an application for certification for the employees of an employer in the non-destructive testing industry.



11. A more complicated problem arises when we turn to the sectors requested by the applicant. Section 126(1) of the Act allows the Board to combine sectors of the construction industry in determining the appropriate unit of employers for accreditation. As noted, the applicant's request is for all of the sectors set out in section 117(e) of the Act, with the exception of the residential sector. From the foregoing description, it is clear that with the exception of residential construction, non-destructive testing is in fact carried on in all of these sectors of the construction industry under the collective agreement upon which this application is based. That quite obviously includes work which would fall clearly within the industrial, commercial and institutional sector of the construction industry. How then does this request for a combination of sectors relate to the province-wide bargaining in the industrial, commercial and institutional sector of construction industry? Both the constituent trade unions in the Quality Control Council, namely, the United Association and the Boilermakers' Union are subject to designations with respect to collective agreement in the industrial, commercial and institutional sector by the Minister of Labour pursuant to section 139(1)(a). Section 139(2) of the Act reads as follows:

"Where affiliated bargaining agents that are subordinate or directly related to different provincial, national or international trade unions bargain as a council of trade unions with a single employer bargaining agency for a province-wide collective agreement, the Minister may exclude such bargaining relationships from the designations made under subsection (1), and subsection 146(2) shall not apply to such exclusion."

The designations affecting Boilermakers were made January 30th, 1978 and both the designation of the employer bargaining agency and the employee bargaining agency contained an exemption.

"Pursuant to subsection 2 of section 127 of the *Labour Relations Act* I hereby exclude from this designation the bargaining relationships between the Quality Control Council of Canada and the Stress Relieving Contractors and between the Quality Control Council of Canada and the NDT Management Association, this exclusion is subject to the condition that the constitution of the Quality Control Council of Canada is filed together with a copy of the collective agreements affecting these employees."

With respect to the other constituent member of the Quality Control Council, the designation related to Plumbers and Pipefitters, was amended by the Minister of Labour on May 14th, 1982 in precisely the same terms as set out for the Boilermakers designation. It is, therefore, clear that the Minister of Labour has exempted from the regime of province-wide bargaining, the Quality Control Council of Canada and its collective agreement between it and the NDT Management Association, the applicant in the present case. In such circumstances, therefore, there is no impediment to including the industrial, commercial and institutional sector as one of the sectors of the construction industry appropriate for collective bargaining in the present application. Indeed, given the exemption from the industrial, commercial and institutional sector of the construction industry, it is desirable that the sectors of the construction industry

affected by this application for accreditation ought to be as extensive as is possible, and, since on the facts, it is clear that the work performed under the collective agreement on which this application is based is performed in all sectors of the construction industry other than residential construction, it is highly appropriate that all such sectors be included in the appropriate unit of employers in this application.

12. For the foregoing reasons, therefore, the Board finds that all employers of non-destructive testing technicians, trainees and helpers for whom the respondent has bargaining rights in the Province of Ontario in the industrial, commercial and institutional sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector in the construction industry, constitutes a unit of employers appropriate for collective bargaining.

[Detailed findings of fact relating to employer membership omitted].

• • •

18. Having regard to all of the above findings, a Certificate of Accreditation will issue to the applicant for all employers of non-destructive testing technicians, trainees and helpers for whom the respondent has bargaining rights in the Province of Ontario in the industrial, commercial and institutional sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector in the construction industry and in accordance with section 127(2) of the *Labour Relations Act*, for such other employers for whose employees the respondent may obtain or has obtained bargaining rights after June 7, 1982.

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**0711-82-M Ontario Public Service Employees Union, Complainant, v. Sheridan College of Applied Arts and Technology, Respondent,**

**Employee – Employee Reference – Whether “campus supervisors” exercising managerial functions – Whether excluded by *Colleges Collective Bargaining Act* – Board finding supervisory authority insufficient for exclusion – Security functions not causing Board to exclude in its discretion**

**BEFORE:** R. O. MacDowell, Vice-Chairman and Board Members W. H. Wightman and B. L. Armstrong.

**APPEARANCES:** *W. A. Lokay and M. LaPointe for the complainant; Janice Baker and P. M. Matthews for the respondent.*

**DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; January 13, 1983**

I

1. This is a reference under section 82 of the *Colleges Collective Bargaining Act* (“the Act”) concerning the status of six individuals classified as “campus supervisors”. In accordance with its usual practice, the Board appointed a Labour Relations Officer to meet with the parties and inquire into the duties and responsibilities of the disputed individuals. Pursuant to that appointment, the Officer convened meetings of the parties at the premises of the respondent employer on Thursday, August 26, 1982 and Thursday, September 9, 1982. The parties were agreed that the duties and responsibilities of Mr. W. Little would be considered representative of both himself and those of the other campus supervisors. The parties were further agreed that should the campus supervisors be found to be “employees” for the purposes of the Act, they would properly fall within the “support staff bargaining unit”. The respondent employer argues, however, that these individuals exercise managerial functions and cannot, therefore, be included in that bargaining unit. The union asserts the contrary.

2. The provisions of the *Colleges Collective Bargaining Act* to which reference will be made are as follows:

1. In this Act and in the Schedules,

• • •

(f) “employee” means a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2;

• • •

(1) “person employed in a managerial or confidential capacity” means a person who,



- (i) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,
- (ii) spends a significant portion of his time in the supervision of employees,
- (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
- (iv) is employed in a position confidential to any person described in subclause i, ii or iii,
- (v) is employed in a confidential capacity in matters relating to employee relations,
- (vi) is not otherwise described in subclauses i to v but who, in the opinion of the Ontario Labour Relations Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

• • •

## SCHEDULE 2

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

- (i) foremen,
- (ii) supervisors,
- (iii) persons above the rank of foreman or supervisor,
- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions,
- (v) *other persons* employed in a managerial or confidential capacity,

(vi) persons regularly employed for not more than twenty-four hours a week,

(vii) students employed in a co-operative educational training program undertaken with a school, college or university,

• • •

[emphasis added]

Brief reference will also be made to sections 1(3)(b) and 12 of the *Labour Relations Act*:

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

• • •

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

12. The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

## II

3. The structure of a community college differs from that of a private business, and some care must be taken before utilizing concepts developed in a private sector setting, or superimposing them on a public sector educational institution. No doubt it was an appreciation of these differences which prompted the Legislature to enact a specialized statute which spells out, in much more detail than the *Labour Relations Act*, precisely those functions which, if exercised, should exclude an individual from the ambit of collective bargaining. However, the purpose of the statutory exclusions is one which the *Colleges Collective Bargaining Act* shares with other labour relations statutes: to ensure that persons in the bargaining unit are not faced with a conflict of interest in respect of potential obligations to their employer which arise from managerial or related responsibilities. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides", whose interest and objectives are sometimes divergent. This purpose has been succinctly stated by the

British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, (1974) Can. LRBR 1 at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management – on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees,



the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

4. The determination of employee status under the *Colleges Collective Bargaining Act* involves a consideration of both the provisions of the Act itself, and the provisions of the appended schedules which define the composition of the two bargaining units. Section 1(f) of the Act specifies that the term "employee" refers to individuals in one or the other of those units; but the unit descriptions exclude persons who, *inter alia*, are "employed in a managerial capacity". This, in turn, takes one back to section 1(1) of the Act which spells out the kind of functions which should be considered "managerial" and the kinds of persons who must be excluded under this heading.

5. A perusal of the schedules will reveal certain individuals who are clearly excluded from collective bargaining on the basis of readily ascertainable criteria – for example, persons employed for less than twenty-four hours per week. The status of these persons does not give rise to controversy. But the position of many other persons will not be specifically mentioned, or may be described ambiguously. This is the case of "foremen", or "supervisors" who are mentioned without specific criteria for their identification other than those found in section 1(1).

6. Section 1(1) envisages a pyramid, or managerial hierarchy which includes "at the top", persons who formulate organization objectives and policy, and nearer the bottom, supervisors who form the "first line" of management. In addition, there are other individuals of subordinate status whose involvement in the grievance procedure, employee relations, or with senior management requires their exclusion, even though they do not themselves exercise supervisory responsibilities vis-a-vis other employees. Finally, section 1(1)(vi) gives the Board a general discretion to exclude other members of the "management team" who have not been specifically described.

7. While the statutory language is more detailed than in the *Labour Relations Act*, it is recognized that the application of these provisions is bound to raise interpretive difficulties. There will always be a grey area between those who are clearly included in the bargaining unit, and those who are excluded from it. That is why provision is made for reference to the Board, which attempts to resolve these difficulties in accordance with the evidence in each case and the purpose of the statutory exclusions.

8. In the case of so-called "first line" managerial employees, the Board has focused on the extent to which the disputed individual can significantly affect the economic lives of his fellow employees so that, for collective bargaining purposes, he is put in a position that creates a conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases, or discipline employees are all manifestations of "managerial" authority, the exercise of which would be incompatible with participation in trade union activities as an ordinary member of the bargaining unit. Indeed, there may be individuals whose formal authority appears to be limited, but who nevertheless make recommendations affecting the economic position of their fellow employees which are so frequently forthcoming, and consistently followed by superi-

ors, that it can be said that, in effect, the “effective” decision is made by them. It is this kind of recommendation which the Board has characterized as an “effective recommendation”. The inclusion of these persons in the bargaining unit would also raise the kind of conflict of interest which the statutory exclusions are designed to avoid. In contrast with the position taken by labour boards in other jurisdictions, this Board has held that they too must be excluded.

9. In each instance, the Board seeks to determine the nature and extent of the disputed individual’s authority, as well as the extent to which that authority is actually exercised. If the allegedly managerial functions are not exercised, neither a “managerial” job title, nor a purported “managerial” job description, is likely to be given much weight. Further, there should be some rational relationship between the numbers of superiors and subordinates, consultation, or “input” should not be confused with decision-making, and neither technical expertise nor the importance of an employee’s functions can automatically be equated with managerial status. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white-collar service sector) some of them will be engaged in co-ordinating activities which are largely routine, are carried out within a pre-established framework of rules and policies, and are subject to actual managerial authority exercised from above. They act as conduits of information rather than decision-makers, and it may be difficult in the context of a labour relations statute to establish the kind of conflict of interest to which the exclusion portions of the statute are directed. Finally, some individuals may perform some job functions which arguably raise collective bargaining concerns, but many other duties which do not. It was their situation which the Legislature was addressing when it prescribed the exclusion of persons who spend a “significant portion” of their time in the supervision of employees (see section 1(1)(ii) ). This approach is similar to that considered by the Board in *Falconbridge Nickel Mines Ltd.* [1966] OLRB Rep Sept 379:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board’s difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person’s time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction

of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall* case above referred to [*Local 2890 United Steelworkers of America v. The R. McDougall Company Limited* [1943] O.W.N. 743] titles alone are not much assistance in determining what a person's functions really are.

While the cases cited above would seem to indicate that while a person may have minor supervisory function or very limited confidential function in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reason of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

For these individuals it is a matter of weighing the totality of their responsibilities in order to determine whether they are properly regarded as part of the management team. And, of course, given the remedial nature of the statute and the purpose of the statutory exclusions, it is incumbent upon any party seeking to establish or maintain an excluded classification to demonstrate that the functions performed by the subject individuals, create the "mischief" which the exclusions were designed to avoid.

10. With this introduction then, we turn to the facts in the instant case.

### III

11. The respondent operates from three separate locations or campuses. Mr. Little is one of the three campus supervisors at the Oakville Campus. He works in the plant department and reports to Howard McKeown, the supervisor of grounds, maintenance and security. On the Oakville Campus the supervisory responsibilities which, it is said, require the exclusion of the campus supervisors from the bargaining unit, are exercised in respect of three bargaining unit employees – two handymen and one journeyman. In other words, the alleged ratio of first-line supervisors to subordinates is one to one. Three bargaining unit employees are said to have three direct "supervisors".



12. There is obviously no magic number which prescribes the appropriate ratio of managers to managed in any given case. It depends upon the employer's organization. But in the Board's experience, it would require a highly unusual organization or managerial structure, and the clearest possible evidence to support a ratio of superiors to subordinates of the order proposed here. Even in the public sector one does not expect three employees to have three foremen.

13. Mr. Little has been employed by the College for more than eight years and performs a variety of duties – many of which can be described generally as “security functions”. Security services are provided by an outside contractor during the night (12 o'clock to 8:00 a.m.) and on weekends. At other times, this function is performed by the three campus supervisors who alternate on the day and evening shifts, and perform a liaison role between the College and the subcontractor. Because the three campus supervisors alternate shifts, Mr. Little estimated that he spends approximately forty per cent of his time working evenings or weekends. If required to work overtime, he may earn a premium rate of pay, or take lieu time off at some other time.

14. Mr. Little “supervises” (i.e., monitors) campus events where alcohol is consumed, such as post-football “pub nights”, or occasions sponsored by a member of the Faculty. Mr. Little presides over these functions to maintain order and ensure that liquor licensing requirements are being followed. He explains the function rules to the Faculty host, checks liquor prices, ensures that the number of staff available to sell tickets and “man the bar” is adequate, makes sure that no minors are involved, and is responsible for stock control of the alcoholic beverages being delivered to the bar or returned to storage. In this regard, he is responsible for the issuance of receipts and related paperwork. On occasion, it has been necessary for him to close down the bar or terminate a function – as, for example, when an intoxicated student became involved in a serious off-campus accident, or there was a prolonged power failure and it was necessary to clear the cafeteria in which the function was being held. Mr. Little indicated that presiding over such functions took up twenty to thirty per cent of his time.

15. In addition to presiding over these functions, Mr. Little has a variety of responsibilities involving the safety and security of the campus. He ensures that physical stores are properly secured, checks for safety or fire hazards, and patrols the premises. After the Board of Governors' meetings, Mr. Little told the Board he checks to ensure that no “sensitive documents” have been left behind. He has never found any. If he comes upon a door which should be locked, he locks it.

16. As might be expected of individuals performing a security role, Mr. Little is involved in the investigation of thefts or other criminal acts which occur on the campus. In this regard, he co-operates with the police and makes reports to Mr. McKeown, his superior. The trade union, he said, does not become involved, although there may be isolated incidents where the alleged criminal activity may involve an employee. Mr. Little said there were perhaps six or eight such instances in the eight years of his employment with the respondent. He further indicated that twice in the past three years there was a theft, which presumably involved an employee, but he was reluctant to indicate whose decision it was to call in the police, nor is it clear how the

employee concerned was dealt with or what, if anything, Mr. Little had to do with that process. He said that to his knowledge the union was not involved. The problems normally arise from students and outsiders rather than bargaining unit employees. For example, Mr. Little mentioned his involvement in a drug investigation which has been ongoing for some fourteen months, but which did not involve any bargaining unit employees.

17. Mr. Little has a residual responsibility for the supervision of part-time students who are employed by the College to perform cleaning and maintenance functions. They work on a part-time basis, with varying hours of work, doing such things as moving furniture, painting, and cleaning. They are referred from other parts of the College, and are paid a fixed rate for their services. Their number is prescribed by the College and the campus supervisor has some role in their selection and supervision. However, these individuals are excluded from the Act, are not represented by the trade union, and we cannot attach much significance either to their presence or the relationship between them and the campus supervisors. It is not unusual for students to be under the direction and control of full-time bargaining unit employees – in the library, for example, where part-time students are supervised by library technicians. It does not follow that those employees are “managerial” within the meaning of the *Colleges Collective Bargaining Act* or the *Labour Relations Act*. More often, they are simply senior employees to whom the supervision of part-time students has been delegated. There is no potential for the kind of collective bargaining friction with which the statutory exclusions are concerned.

18. The campus supervisors also exercise certain responsibilities respecting the outside contractors who perform work on the Campus. It is the campus supervisors who check all areas of the College to identify areas in need of painting or repair. These jobs are subcontracted to various contractors and, thereafter, the campus supervisors monitor their progress. These maintenance and repair jobs are beyond the capacity of the respondent's own employee complement.

19. The primary basis for the exclusion of the campus supervisors from the bargaining unit rests upon their relationship with the campus handymen and journeyman. It is argued by the respondent that this is a managerial or supervisory relationship. The evidence does not bear out that contention.

20. Persons with maintenance problems phone the plant department with their complaint which is generally received by the plant department secretary. She makes out a work order stipulating the work to be done which she gives to a campus supervisor, who, in turn, gives the job to a handyman or journeyman. The campus supervisors share the office and may also make out work orders. When the job is completed the handyman or journeyman reports that fact to the campus supervisor who notes that the job has been completed. On the Oakville Campus, work orders are generally picked up at the desk of Mr. Little.

21. Mr. Little testified that (together with the other two campus supervisors) he was the “supervisor” of the two handymen and the journeyman. However, in practice, the extent of his authority over them is severely circumscribed.

22. Mr. Little indicated that he had no real influence in the hiring process. Some seven years ago he participated in the interview of an individual who was subsequently hired as a journeyman, however, that individual was the only applicant, and Mr. Little testified that he had no real input in the decision. There is a hiring committee in the maintenance department of which Mr. Little is not a member. He testified that if another handyman were to be hired he thought he would "possibly" discuss the matter with Mr. McKeown and he "assumed" that there was an interview committee who would consider the candidates. Mr. Little conceded that he was not involved in the interviewing process and, we do not think his selection of part-time students (referred to him by others and excluded from the Act) is particularly significant.

23. Mr. Little does monitor the work of the two handymen and the journeyman, but it is difficult to characterize this responsibility as "managerial" or such as to warrant exclusion from the bargaining unit. Mr. Little has no input into these employees' salary or advancement. He has never been involved in, or discussed, a promotion, transfer, demotion, or layoff. The amount of overtime to be worked is determined by Mr. McKeown, and is allocated among the employees on the basis of their accumulated lieu time. There is no evidence that Mr. Little has *required* anyone to work overtime. Mr. Little is advised when someone wants casual time off, but that time never extends beyond two or three hours and is taken from a bank of "lieu-time" which the handymen or journeyman have already accumulated. Mr. Little said that he could not grant a leave of absence for as much as a day. The handymen or journeyman tell Little of their intention to take time off, and Little tells the secretary who marks it on their time sheets. Any significant time off must be arranged in advance with the approval of McKeown. An employee returning from sick leave advises the personnel department.

24. In his eight years of service, Mr. Little has had no involvement with the grievance procedure. He has never received a grievance, nor has he engaged in any discussions about a grievance or labour relations matters. He may have given a verbal admonishment to the handymen or journeyman, but he has never been involved in more serious discipline. He has been present at meetings with management, but there has been no discussion of labour relations matters, or "personalities".

25. Mr. Little initially testified that he had responsibility for scheduling the hours of the handymen and journeyman, however, on closer examination, he admitted that they only work on the day shift. There is no real scheduling to be done for them - unlike the campus supervisors themselves who are required to work evenings. Mr. Little initially testified that he had issued written warnings on his own initiative, but, when pressed, he admitted that he had not done so directly and that anything other than a verbal warning was channelled through Mr. McKeown. He testified, at first, that he had recommended a suspension, then suggested that he had not done so personally, then indicated that he had taken an individual to his supervisor and that a suspension had resulted. He initially testified that he had purchased up to two thousand dollars worth of material without discussion with Mr. McKeown, then admitted that he did not normally purchase more than one hundred dollars worth of material without approval and that he only approved the higher amount when, for a time, he was substituting for his supervisor. Jack Annis, one of the two campus handymen allegedly "supervised" by



Little, testified that in the eight years of his employment with the respondent he has received a verbal and written warning, both of which came from Mr. McKeown.

26. On the basis of the evidence before us, and having regard to the definition of the bargaining unit and the statutory exclusions prescribed by section 1(1) of the Act, we cannot conclude that the three campus supervisors should be excluded. The degree of authority which they exercise vis-a-vis the three bargaining unit employees is simply insufficient to raise the kind of conflict to which the statutory exclusions are directed. Despite the fact that these individuals have been excluded from the bargaining unit for some time, we do not view their inclusion as causing any collective bargaining difficulties or problems of the kind which the statutory exclusions were intended to avoid.

27. It is argued by the respondent that the security functions performed by the subject individuals, in themselves, involve some potential for conflict with other members of the bargaining unit. There is some indication of this possibility in the evidence of Mr. Little, although, in practice, it seems to be somewhat remote. It is conceivable, however, that an investigation in which he *might* be involved *might* produce information which members of management *might* act upon to justify the discipline or discharge of an employee – although, we repeat, there is no evidence that, in fact, Mr. Little has been so involved. In his eight years of service with the respondent his activities have rarely put him in a position where a potential conflict might possibly arise and even then his role is ambiguous. There is no evidence indicating that he is the effective decision-maker in determining how employees should be dealt with and in those eight years he has never dealt with or participated in a single grievance. He works, where necessary, in association with the local police forces, and makes reports to management, but he does not have effective decision-making authority. The potential for conflict is, in practice, substantially absent. There is really little indication of any problems which might arise if Mr. Little and his colleagues were included in the bargaining unit. At most, there is a possibility that they might be a witness in a grievance proceeding – although this has never actually happened. We also note that the master agreement covering community colleges contains a classification for security guards. Individuals exercising security functions have not been excluded from the agreement covering Ontario's community colleges.

28. The *Colleges Collective Bargaining Act* does not even mention let alone exclude security personnel. In this respect it differs from the *Labour Relations Act*. The latter statute, of course, does not exclude security guards from collective bargaining, but in recognition of their special responsibility to protect the property of their employer, it does require that they be grouped in a separate bargaining unit represented by a separate trade union. However, the exclusion contemplated in the *Labour Relations Act* is not an exclusion from collective bargaining altogether, nor is it based upon managerial status. That issue is dealt with in section 1(3)(b) of the *Labour Relations Act*, and, in our view, the separate treatment underlines the different character of "security" and "managerial" functions.

29. Under section 1(1)(vi) of the *Colleges Collective Bargaining Act*, the Board has a discretion to exclude individuals who are not managerial, but who, in the Board's

opinion, should nevertheless be excluded from collective bargaining by reason of their duties and responsibilities. That section is broad enough to permit the exclusion of security personnel such as the campus supervisors and there is something to be said for that solution if the potential conflict of interest which we have already discussed were sustained on the evidence. The fact that the *Labour Relations Act* gives statutory recognition to such potential conflict supports this approach. On the other hand, had the Legislature wished to exclude security guards or accord them special treatment it could easily have done so as it has done in the *Labour Relations Act*; moreover, as we have already noted, the evidence simply does not establish the "mischief" which would require exclusion. To exercise our discretion in the manner suggested by the respondent would not only be tantamount to legislation – in effect, excluding an entire category of employee from the ambit of statute – but is unnecessary, as the circumstances of this case indicate. We decline to do so.

30. For the foregoing reasons, the Board finds that the campus supervisors are employees within the meaning of the *Colleges Collective Bargaining Act*.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

1. Mr. Little's evidence, as reflected in paragraph 24 of the majority decision, was not of great assistance, particularly insofar as assessing the supervisory managerial aspects of his responsibility, and the Board was thus reduced to making a difficult judgment call.

2. However, the "security" aspects of his responsibilities, as reflected particularly at paragraph 15, enabled counsel for the respondent to argue, persuasively in my view, that the employer has good reason for being apprehensive at the prospect of its "campus supervisors" being included in the main bargaining unit.

3. If we were to exercise our discretion in deciding to exclude them, as requested by the respondent, we would be doing so based on this specific fact situation and would not, I think, be excluding an "entire category of employee from the ambit of the statute". In my view, it was successfully argued that the longer term interests of all groups within this particular College's community would be served by their exclusion and I would have so found.

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**0610-82-R** Irma C. Krippendorf, Applicant, v. Service Employees International Union Local 183, Respondent, v. **Westgate Nursing Home Inc.**, Intervener

**Petition – Termination – Union steward suspended day prior to circulation of petition – Whether affecting voluntariness of petition – Whether admission that suspension unlawful and apology in notice posted curing taint**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members M. J. Fenwick and W. H. Wightman.

**APPEARANCES:** *Robert J. Reynolds, Irma Krippendorf, Elva Till and Marcella Beaudrie for the applicant; Jeffrey Egner, Don Burshaw II, Earlene Clark and Bill Love for the respondent; David J. Moll, Richard Bond, Theresa Kelly for the intervener.*

**DECISION OF THE BOARD;** January 19, 1983.

1. This is an application for termination filed under section 57 of the *Labour Relations Act*. The applicant seeks a declaration that the trade union no longer represents the employees in the bargaining unit for which it is the exclusive bargaining agent, that is, all employees of the employer at Westgate Lodge Nursing Inc. in the City of Belleville, Ontario, save and except graduate and registered nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

2. The union was certified as the bargaining agent for the employees in the above described bargaining unit on June 11, 1981. The instant application for termination was filed approximately one year later, on June 24, 1982. It is readily apparent from the evidence and undisputed by counsel that, throughout, the relationship between the employer and the union has been a strained one.

3. The applicant, Ms. Irma Krippendorf, testified to the origination and circulation of both the statement of desire filed with the Board in support of the instant application for termination and another statement of desire circulated some six weeks earlier. The first statement of desire was submitted together with an earlier application for termination which was filed on May 14, 1982. That application was withdrawn, however, when the applicant realized it was untimely; a new statement of desire was then circulated to support the instant, timely application.

4. Still another statement of desire was filed in opposition to the union's application for certification. The Board, through its decision dated June 11, 1981, determined, that it was not a voluntary expression of the views of its signatories. Ms. Krippendorf testified that the people who tried to keep the union from coming in in the first place are largely the same people who support the instant application for termination. She described the Home as "a house divided" between union and non-union supporters. She stated that with months of tension, strife and stress resulting from the union's presence, employees decided that something should be done about the problem and thus supported this application for termination.



5. Ms. Krippendorf testified that she drafted the first statement of desire filed with the initial, untimely application for termination on Thursday, May 6, 1982. It is undisputed that on May 6, 1982, the employer indefinitely suspended the chief steward without giving any reasons whatsoever. Ms. Krippendorf maintains, however, that her drafting of the petition had nothing to do with the suspension of the chief steward. She stated that she decided to draw up the petition that day because she was off work and had the time. Moreover, she had obtained money from the sale of her house which enabled her to pay a lawyer for assistance in the matter. She stated that she made no comments concerning the suspension of the chief steward while circulating the document.

6. The Board concludes from the evidence that management was not directly involved in the preparation or circulation of either of the petitions supporting the termination applications, and provided Ms. Krippendorf with no direct assistance. The evidence further reveals that the signatures on the two petitions were obtained off the employer's premises.

7. Counsel for the union submits, however, that the Board should not conclude that the statement of desire filed in support of the instant application for termination is a voluntary expression of the views of its signatories. In support of his submission counsel relies on two overt steps taken by the employer in the spring of 1982: a meeting convened by the Home's administrator in March of 1982 where he imposed what counsel for the union described as a "gag order" and the subsequent suspension of the chief steward.

8. Ms. Earlene Clark, the chief steward, testified to the meeting called by Mr. R. Bond, the administrator of the Home, in March of 1982. The persons in attendance were Mr. Bond, Ms. Clark, Ms. Evelyn Radford (a housekeeping aid in the bargaining unit) and Ms. Jean Prentice (the Director of Nursing). At a previous union meeting Ms. Radford had stated that she felt Mr. Bond was unfair in the way he handled grievances. Ms. Clark testified, without contradiction from Mr. Bond, that at the March meeting, Mr. Bond told Ms. Radford that she had slandered him and warned that "if there was anymore talk about him he would take disciplinary action or start a civil suit". Ms. Clark stated that she interpreted Mr. Bond's warning to mean if there was anymore talk about him either at union meetings or around the Home Mr. Bond would take disciplinary action or commence a civil suit.

9. Mr. Don Burshaw, the president of Local 183 of the Service Employees Union and the business agent responsible for administering the collective agreement at Westgate, testified that the first union meeting held following the March meeting took place at the beginning of May. He stated that he discerned a distinct and unusual reticence among the employees. He commented that they seemed unwilling to express their views or respond to him on the matters raised. He noted that there was none of the usual exchange or conversation. As a result, after speaking for approximately an hour on union matters, he digressed to talk about employees' rights, and informed the employees that they had the right to speak at union meetings and to say what they wanted. Mr. Burshaw noted that his attempt to reassure employees did not improve the meeting, although some light conversation followed.

10. The undisputed evidence reveals that very shortly thereafter Ms. Clark was suspended without reason and the first petition against the union was circulated. On Thursday, May 6th, one or two days following the union meeting Ms. Clark was called into the office. She was there informed by Ms. T. Kelly, Mr. Bond's secretary, that Mr. Bond had given her orders to suspend Ms. Clark immediately. In response to the suspension, Mr. Burshaw arranged a meeting with Mr. Bond which was held the following Monday, May 10th. The persons in attendance were Mr. Bond, Mr. Burshaw, Ms. Kelly, Ms. Clark and Ms. Radford as well as Ms. Cathy Ropper, Mrs. Suel and Ms. Burns, additional members of the bargaining unit. Mr. Burshaw testified that the meeting started with Mr. Bond asking if Mr. Burshaw had told employees about some of the proposals for negotiations. After some discussion, Mr. Burshaw reminded Mr. Bond that the purpose of the meeting was to discuss the Clark suspension and not negotiations. Mr. Burshaw stated that Mr. Bond also asked if he had told employees that they had a right to speak at union meetings. Mr. Burshaw replied in the affirmative. According to Mr. Burshaw, Mr. Bond then asked whether that was true even if they were making slanderous remarks. Mr. Burshaw asked Mr. Bond to clarify what he meant by slanderous remarks but Mr. Bond, according to Mr. Burshaw's uncontradicted evidence, never gave him a direct answer. They then entered a discussion concerning Ms. Clark's suspension. Mr. Burshaw's uncontradicted evidence, confirmed by the evidence of Ms. Clark, indicates that Mr. Bond made the following reply when asked by Mr. Burshaw why he had suspended Ms. Clark: He said, "I did it to get at you [Mr. Burshaw]. If I can't control you maybe the employees can". Mr. Burshaw stated that from that point the conversation became heated and he told Mr. Bond he intended to police the collective agreement whether Mr. Bond liked it or not. Prior to the end of the meeting Mr. Bond stated his intention to bring Ms. Clark back to work forthwith and to compensate her for her two lost days of work.

11. Notwithstanding these steps from the employer, the union filed an unfair labour practice complaint with the Board on May 13, 1982. Mr. Burshaw stated that he filed the complaint because he felt that the employer's reimbursement of Ms. Clark's lost wages would not put the situation back on the rails because too much had developed by that point.

12. On May 18, 1982 Mr. Burshaw received from Mr. Bond the following letter dated May 14, 1982:

May 14, 1982

Mr. Donald Burshaw  
President  
S.E.I.U. Local #183  
Vistoria Lodge  
295 Albert Street  
Belleville, Ontario

Dear Mr. Burshaw:

Regarding the temporary suspension of Mrs. Clark. I do not feel that I can justify this impulsive act. Because, I was under a lot of pressure, I did not give this matter proper consideration.

I have recently apologized to Mrs. Clark, and I hope that you too will accept my atonement ... with the promise that action of this kind will never happen again.

Sincerely,

R. S. Bond  
Administrator

c.c. Mrs. E. Clark

Mr. Burshaw stated that the union pursued its complaint of an unfair labour practice with the Labour Relations Board notwithstanding this letter because it was his opinion that the sole purpose of the letter was to avoid the complaint before the Board.

13. A hearing with respect to the complaint was therefore scheduled by the Board. An Officer met with the parties and the employer, by way of settlement, agreed to post the following notice to all employees:

NOTICE: TO ALL EMPLOYEES

On May 26th, 1982, I wrongfully suspended Mrs. Earlene Clark.

*"I ADMIT THAT THE SUSPENSION WAS CONTRARY TO THE LABOUR RELATIONS ACT. THIS WILL NOT HAPPEN AGAIN."*

I have apologized to Mrs. Clark and to the Union. Mrs. Clark has been paid for the two (2) days she was off work.

YOU HAVE EVERY RIGHT TO SPEAK FREELY AT YOUR UNION MEETINGS.

YOU HAVE EVERY RIGHT TO SPEAK FREELY TO YOUR REPRESENTATIVES AND STEWARDS.

NO EMPLOYEE WILL BE ILLEGALLY DISCIPLINED IN ANY FORM FOR UNION ACTIVITY.

June 10th, 1982

Richard Bond,  
Administrator  
Westgate Nursing Home Inc.

THIS NOTICE IS TO BE POSTED FOR A PERIOD OF 30 DAYS - IT IS NOT TO BE REMOVED OR DEFACED BY ANY EMPLOYEE.

14. Ms. Krippendorf testified that when she circulated the two petitions against the union she made no comments about either the Clark suspension or the March 5th meeting where Mr. Bond imposed what counsel for the union described as a "gag order".



15. Counsel for the applicant asserted that the petition dated June 21, 1982 and filed in support of the instant application was the result of feelings negative to the union that had developed over a substantial period of time. He argued that the union presented no evidence of a connection between the employer's wrongful suspension of Ms. Clark and the employees' expression of their views on the petition. He stated that there was no evidence to suggest that when the first petition was circulated anyone knew about Ms. Clark's suspension and argued that by the time the second petition was circulated, the employer had posted a full capitulation. Moreover, he stated, there was no evidence to establish that any of the signatories were privy to the March 5th meeting when Mr. Bond warned that if there were any more slanderous comments he would take disciplinary action or commence a civil suit. Counsel emphasized that with the June 10th posting of the employer's notice, some 10 days prior to the circulation of the second petition, the employees would have known that they would have had nothing to fear from the employer.

16. In a matter such as this the onus is on the applicant to establish that the statement of desire filed in support of the application for termination is a voluntary expression of the views of its signatories. Having carefully reviewed the evidence and the submissions of the parties, the Board concludes that the applicant has not discharged that onus of proof. In March of 1982, Mr. Bond called Ms. Radford, a person active in the union, into his office with allegations that she had made slanderous comments against him. Mr. Bond gave no testimony before the Board and thus did not clarify for the Board what, if any, slanderous comments he had in fact heard. According to Mr. Burshaw, Ms. Radford had simply stated her opinion that Mr. Bond was unfair. In any event, Mr. Bond warned that if anymore such comments were made, discipline or a civil suit would follow. The Board accepts from the uncontradicted testimony of Mr. Burshaw that this warning had a distinct chilling effect on the next union meeting held in May, days prior to the circulation of the first petition. Moreover, a few days later, Ms. Clark, the chief union steward, was suspended without cause. It is readily apparent from the uncontradicted evidence that Mr. Bond suspended Ms. Clark with the sole intention of "getting at" Mr. Burshaw, the person responsible for administering the collective agreement. In the Board's assessment Mr. Bond's retaliation against the union channelled through the suspension of the chief steward was not sufficiently nullified by the posting of the June 10th Notice to Employees to satisfy the Board that the statement of desire circulated less than two weeks later was a voluntary expression of the views of its signatories. Accordingly, there is no basis upon which to order the taking of a representation vote.

17. While by all accounts the relationship between the employer and union has been strained from the outset, and has adversely affected numerous employees, it is to be hoped that the dismissal of this application for termination will prove to be a watershed and that the relationship between the union and the employer will become a constructive one.

18. For the reasons set out above the application for termination is hereby dismissed.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

1. I would have thought the natural human reaction of an employee who is pressured by an employer to sign a petition would be to look for an opportunity to retaliate and that employers would be cognizant of this potential.



2. In my view even employees who were not particularly sympathetic to a labour union which represented them would be inclined to resent employer attempts at interference and to express that resentment at the earliest and safest opportunity.
3. What better opportunity could there be to retaliate than in the protected atmosphere of a government-supervised secret ballot?
4. It is reasonable to assume that votes are conducted by the government in a manner such that even employees who may have no understanding of the legislation or their rights must recognize that the secrecy of their ballot decision will be fully protected by the authority of the State.
5. It follows the interference of an improper nature of an employer would be counter-productive in that it would only serve to solidify union support. By the same token, serious labour relations consequences can also result when the Board errs in its perception of the wishes of a substantial group of employees, even if they represent a numerical minority of the bargaining unit, for they too are entitled to suspect that their view would attract majority support in a secret ballot vote. Those whose petition has been disallowed, and who thus *have been denied a vote on the basis of representations from the union claiming to represent them*, will distance themselves from union supporters and the issue will continue to fester.
6. I cannot disagree with the majority in their recitation of the facts and their conclusion that the employer probably knew what was going on, nor with their reservations as to the credibility of some of the petitioners. However, I cannot help but think that the pre-occupation of the Legislature is to provide means whereby the voluntary and true wishes of employees can be determined at the time of application, as well as at subsequent intervals after bargaining relationships have been established.
7. Perhaps in the infancy of union/management relations in Ontario it was appropriate for the Board to adopt a paternalistic and condescending attitude towards employees by conducting witch-hunts into the origination, circulation and custody of petitions on the grounds that the "spectre of an all-powerful employer would follow them even into the sanctity of a government-supervised polling booth" (I here paraphrase *obiter* from an earlier decision seemed to view Canadian society as an ongoing class struggle). In the Canada of 1982, however, I would place much more confidence in the ability of individual employees to make up their own minds even in the face of pressures from either side, be they subtle or overt.
8. I would view a petition for a certification vote in the same light. As long as we had before us identifiable signatures of a number sufficient to satisfy the *union* that a vote was worthwhile, I would be disposed to so order. I would not require that the signatories be members of the union or have made application for membership. I would not require evidence as to how the signatures had been obtained and I would not require that monies have been paid and receipted as evidence of the employees' desire to have the union represent them. The mere existence of the petition supporting the union and calling for a certification vote would be sufficient to entitle the employees and the

union to an expeditious vote and, as a minimum, interim certification, assuming the results warranted and the union so requested.

9. Given this view of petitions as mere triggering devices to the dispositive event of a secret ballot vote, I would not apply the Board's current tests of voluntariness and would therefore have directed a vote in this case.

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**0471-82-R; 0436-82-U; 0511-82-U; 1279-82-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Applicant/Complainant, v. **Wilco-Canada Inc.**, Respondent

**Evidence – Practice and Procedure – Unfair Labour Practice – Whether reverse onus applies to various allegations – Application of reverse onus to alleged freeze provision violations – Procedure where reverse onus applying only to some of allegations – Scope of reply evidence in mixed onus situations – Party going first required to adduce evidence in chief with respect to all allegations**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members E. J. Brady and H. Kobryn.

**APPEARANCES:** *L. A. MacLean Q.C., Clare Meneghini and M. Boyle for the applicant/complainant; R. C. Fillion, T. Sutcliffe and G. R. Wilson for the respondent.*

**DECISION OF THE BOARD;** January 11, 1983

1. The matters before the Board in these consolidated proceedings include an application for certification without a vote pursuant to section 8 of the *Labour Relations Act* (File No. 0471-82-R) and three section 89 complaints (File Nos. 0436-82-U, 0511-82-U and 1279-82-U), in which it is alleged that the complainant trade union has been dealt with by the respondent contrary to the provisions of sections 64, 66, 70, 75 and 79 of the Act. At the commencement of the hearing of these matters on August 31, 1982, the applicant/complainant (hereinafter referred to as the "applicant" or the "union") agreed to proceed first with its evidence. The applicant called a total of eight witnesses in support of its case during the initial eight days of hearing of these matters. At the December 8, 1982 continuation of hearing, after the eighth witness had concluded his testimony, counsel for the applicant announced that the union had completed its case in chief. In view of the fact that a number of the grievors mentioned in the extensive allegations filed by the union in these proceedings had not been called to testify, counsel for the respondent expressed concern that the union might be attempting to split its case and addressed submissions to the Board with respect to a number of matters, including lack of evidence concerning various allegations, the inapplicability of section 89(5) to certain allegations, and the proper scope of reply evidence. After the Board had heard the initial submissions of counsel for the respondent and counsel for the applicant concerning those matters, these

proceedings were adjourned until December 15, 1982 at the joint request of counsel to afford them an opportunity to review the pertinent jurisprudence and prepare further argument concerning those matters. Thus, the Board heard further argument by counsel on December 15, 1982.

2. Counsel were in agreement that a ruling by the Board concerning the applicability of section 89(5) to the various allegations made by the applicant in these proceedings, and concerning the proper scope of reply evidence, would tend to streamline and expedite the hearing of these matters to the advantage of all concerned.

3. It is not disputed that section 89(5) applies to a number of the union's allegations, which include the alleged discharge of lay-off by the respondent of a number of employees for union activity, other alleged anti-union disciplinary action, and alleged express threats to job security by various members of management. However, counsel for the respondent submits that section 89(5) does not apply to the following allegations contained in the various complaints and amendments thereto filed with the Board by counsel for the applicant:

"(5) From in or about April 1982, the said Grant Wilson had advised his supervisors to keep his employees under surveillance and to conduct enquiries for the purpose of identifying any employees who were promoting or showing interest in having a union in the plant and to report all such information to him. On or about 21st May, a supervisor Al Simoes approached employees in the plant and interrogated them concerning their interest or activity in supporting a union and with respect to one employee, he grabbed what appeared to be a union card out of the employee's pocket but before he could read it this employee seized it back and refused to discuss the matter.

(1) Also on or about Wednesday, 26th May 1982, a supervisor, Fred Leitch interrogated employees in the plant and questioned them about their interest in and whether they had been supporting the union in trying to get people signed up. Also on or about the same date, the said Fred Leitch spoke to employees in the company cafeteria at or about 10:00 p.m. who had arrived early for their shift, saying to them 'if you know anything about this union business you had better let me know'.

(19) Between in or about May 26th and 28th, a supervisor, one Jeff Williams was heard telling employees in the plant something to the effect 'this will put a halt to the Union'.

(26) On or about Monday, 14th day of June, 1982, a lead hand one Americo Simoes, a brother of supervisor L. Simoes, openly and in the presence of other employees, removed from the Company bulletin board the green sheet being a copy of the notice to employees, Form 6, of the application for certification Board File



0436-82-U which had been posted by the Company on the direction of the O.L.R.B. in the application for certification. After taking down the notice from the bulletin board he told employees present that it was 'his copy' which he needed for a meeting that night. He also told the employees present something to the effect that 'we sure don't want this in here' meaning the union. It is the contention of the union that this action on the part of Americo Simoes would, in the circumstances, be reasonably interpreted by employees in the plant as having been approved and/or directed by management including Grant Wilson. A meeting of employees, called together by the said Americo Simoes took place in the plant in the afternoon of Monday, June 14th. This meeting was held with the approval and knowledge of Grant Wilson and involved a discussion among the employees about how they could oppose the union. Only a carefully selected group of employees apparently attended at this meeting.

(27) On or about Monday, June 14th, a lead hand, one Astrella Cabelleri was heard approaching employees in the plant during working hours and telling them that if they joined the union they would lose \$3.00 per hour and the plant would close down. She also was heard telling the employees that there would be a meeting at about 3:30 p.m. that day to discuss the matter. Also, on or about the same date a notice was posted on the Company bulletin board inviting people to sign a paper who wanted to be on a [sic] 'association committee'. The association of employees in which management has participated has been in existence in the plant for some number of years. This so-called Employees Association has received financial and other support from the Company and Grant Wilson and other management officials have attended its meetings and participated in its affairs. It is the contention of the Union that this so-called Employees Association is a management sponsored Association intended and calculated to discourage unionism. The said Americo Simoes and Astrella Cabelleri have been active members of the so-called association executive.

(28) On or about Tuesday, 15th June, the said Astrella Cabelleri and Americo Simoes again approached employees in the plant during their working hours and questioned them about whether or not they were in favour of the Union. Also, one Warner Rexer, the President or Acting President of the so-called Association approached persons in the plant during their working hours concerning the Association and the Union.

(29) On or about Friday, June 11th, 1982 at 3:30 p.m. a supervisor one Stan Goodbrand called an employee [Richard Toner] into his office and indicated that the President Grant Wilson, suspected him of being a supporter for the Union and that the employees [sic] should be very careful about his conduct.

(30) In or about the first part of June, 1982, supervisor Al Simoes was heard asking employees if they wanted to volunteer to be officers on the executive of the said 'Association'.

(Paragraph 1 of union counsel's letter dated August 23, 1982) On or about 15th June, 1982, the leadhand, one Valerie West, advised an employee George Miller that he was permanently laid-off for alleged shortage of work. She also advised him that 'we've laid-off 18 more in the plant until the holidays are over'. This employee, George Miller is still on so-called layoff. It is the contention of the Union that this employee was laid-off and terminated as part of the Respondent's anti-union retaliatory programme as expressed by President Grant Wilson at the said meeting of May 25th, 1982, and also because he was suspected of being a union sympathizer and supporter.

(Paragraph 3 of that letter) It is also the contention of the Union that the some 18 persons referred to by Valerie West were also laid-off for the same purposes.

(Paragraph 6 of that letter) In or about the latter part of May, 1982, the Respondent's supervisor Fred Leitch, approached an employee Sandy Vajdek and accused her of passing around a union paper in the plant indicating that the Company were considering disciplinary action against her. She denied that she had done this and apparently no further action was taken.

(40) On or about September 15th, 1982, at or about 3:30 p.m. Grant Wilson, Wilco's President, began an association meeting by saying:

'If you have a fucking tape recorder in here, get it out now'.

While saying this Grant Wilson was looking directly at Richard Toner who at the time was approximately 2 feet away. Two days later, on or about September 17th, 1982, Richard Toner was 'permanently' laid off and refused the opportunity of bumping less senior employees in other departments. This employee has shown considerable support for the U.A.W., and it is contended that his layoff and the refusal of his right to bump less senior employees was part of the Company's anti-union campaign and was intended to be interpreted as such. Further, it is the contention of the Complainant Union that this layoff was orchestrated in the circumstances to show all employees what their fate would be if they decided to attend and give evidence before the Labour Board. This type of behaviour by the Respondent violates Sections 64, 66, and 70 of the Act.

(41) In or about the early part of September 8th, 1982, the Maintenance Electricians were first told by their supervisor, Bill Van Vught that they would now be required to perform the duties of Maintenance Mechanics. At this time a Maintenance Electrician pointed out that such work was not in his job classification. Then, on or about October 1st, 1982, the same Maintenance Electrician was told by his lead hand, Americo Simoes, to perform Maintenance Mechanic's work. The Maintenance Electrician refused to do the work on the basis that it was not part of the work under his classification. The refusal resulted in the Maintenance Electrician receiving a written warning from Supervisor Bill Van Vught. Since Maintenance Electricians were not required to perform Maintenance Mechanics job duties prior to September 1982, and the employer did not receive the consent of the Union for such a change in job duties, there is a violation of Section 79 sub-section 2 of the Act."

4. Counsel for the union contends that, in the context of these proceedings, section 89(5) applies to all of the union's allegations, including those set forth above.

5. Section 89(5) of the Act provides as follows:

"(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization."

In discussing the scope of that provision, the Board wrote as follows in *Domtar Packaging*, [1982] OLRB Rep. July 993 (a case in which the complainants alleged that they had been dealt with by the respondent employer contrary to the provisions of sections 3, 15, 64, 66 and 70 of the Act):

"6. ... [Section 89(5)] is confined to complaints alleging that persons as opposed to, for example, trade unions, have been discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to the Act and such conduct must relate to such persons in respect to their employment, opportunity for employment or conditions of employment. The onus, it is to be noted, is also confined to employers and their organizations and, thus, is not relevant in the context of a fair representation complaint, for example. It is also to be observed that section 89(5) is not on its face limited to specific substantive or charging sections of the Act. More general language is employed.

7. [The quotation of sections 64, 66 and 70 of the Act has been omitted.]



Clearly, allegations made in respect to section 66 trigger section 89(5). This section refers to employment related conduct of employers vis-a-vis employees and persons. However, it is interesting to note that section 70 makes no explicit reference to 'employment, opportunity for employment or conditions of employment'. Thus, while the respondent admitted that section 70, or rather allegations thereunder, trigger section 89(5), such allegations could only trigger 89(5) if it were thought that intimidation or coercion 'factually' relating to a person's employment was sufficient to activate section 89(5). And, indeed, we think this was the intent of the legislature in that section 66 makes no explicit reference to the terms 'intimidation and coercion', terms which are employed in sections 89(5) and 70.

8. From this analysis, one must conclude that the phrase 'contrary to this Act as to his employment, opportunity for employment or conditions of employment' does not require the reliance on a provision of the statute that explicitly deals with employment but rather s. 89(5) applies to any substantive provision that, in relation to a person, can be breached by employment related discrimination or other such improper employer conduct. Clearly, it is possible to envisage employment related discrimination which violates both section 66 and section 64 of the *Labour Relations Act* and it is our view that s. 89(5) was intended to be of benefit to persons in respect of all unfair labour practice conduct by employers affecting employment. It was not intended to give preferential treatment to any one substantive section. Accordingly, we are satisfied that the allegations made before us, if established, could constitute employer prohibited conduct with respect to persons and with respect to their employment, opportunity for employment or conditions of employment within the meaning of section 89(5). Thus, the reliance of the complainants on section 64, 66 and 70 do not justify the Board exercising its discretion and requiring the trade union to proceed first. However, even if we had concluded differently, we are not satisfied that the mere reliance on a section other than one relevant to section 89(5) should always result in the complainant proceeding first. Indeed, this case is a good example with respect to the complaints' reliance on section 15.

9. Should the additional reliance on section 15 dictate that the union proceed first in respect to all its allegations as was the approach followed in *Craftline Industries, supra*? We think not. The section 15 allegation is integrally related to the other fundamental and primary allegations. We are not of the view that the case is one primarily relating to bargaining conduct nor can we conclude that the other sections of the Act were relied upon simply to achieve the employer proceeding first on the section 15 allegation. All the allegations involve many common factual features; we see no substantial embarrassment to the employer if it is required to

proceed first; and much of the allegations involve matters primarily within the employer's knowledge. There is no dispute that whoever proceeds first with respect to the section 15 allegation, the legal burden remains with the complainant trade unions on that issue.

10. We are therefore inclined to agree with the complainants that the primary nature of this case is one centering on sections 64, 66 and 70 and that evidence pertaining to that primary core of the complaint is likely to be relevant and integral to the alleged violation of section 15. Having regard to all the circumstances, the employer will be required to proceed first.

(See also, generally, *I.C.B. Warehousing Division of Alar-Anson*, [1976] OLRB Rep. Oct. 621.)

6. With those principles in mind, the Board will now consider the potential applicability of section 89(5) in the context of the present proceedings. We are unable to accept company counsel's submission that section 89(5) cannot apply to any of the allegations contained in paragraph 5 of the union's allegations (as set forth above). Depending upon the circumstances, interrogation of employees by management concerning union activities could fall within the ambit of threats, coercion, intimidation or other conduct violative of the Act as to the employment, opportunity for employment or conditions of employment of the employees who are subject to such interrogation. Similar observations apply to the allegations contained in paragraph 10. The allegation contained in paragraph 29 falls within the scope of section 89(5) since a threat as to Mr. Toner's employment, opportunity for employment or conditions of employment, is implicit in the statement which Mr. Goodbrand is alleged to have made to him. Section 89(5) might also apply to paragraph 6 of union counsel's letter dated August 23, 1982, in view of the threat of disciplinary action alleged therein, although we would require further details concerning the alleged accusation in order to reach a final conclusion concerning that matter. Furthermore, section 89(5) clearly applies to the allegation with respect to the lay-off of Richard Toner contained in paragraph 40. We do, however, agree with company counsel's contention that section 89(5) does not apply to the allegations contained in paragraphs 19, 26, and 30, since those paragraphs do not contain allegations that any person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to the *Labour Relations Act* as to his employment, opportunity for employment or conditions of employment.

7. With respect to paragraph 27, the statement which lead hand Astrella Cabelleri is alleged to have made to employees in the plant during working hours, namely, that "if they joined the union they would lose \$3.00 per hour and the plant would close", may well constitute a threat (or an act of intimidation or coercion) by the employer as to their employment, opportunity for employment or conditions of employment if, as is implicit in the allegations contained in that paragraph read as a whole in the context of the other allegations in these proceedings, Ms. Cabelleri was acting with the support of management. Although the parties ultimately agreed (on July 21, 1982) to include lead hands in the bargaining unit, the union initially sought their exclusion on the ground that they exercise managerial functions within the meaning of

section 1(3)(b) of the Act. While the union's subsequent withdrawal of its challenge to their inclusion in the unit eliminates that issue, it does not preclude a finding that Ms. Cabelleri was in fact acting on behalf of management in the circumstances set forth in paragraph 27. The fact that at the time when that allegation was filed with the Board (June 23, 1982) the union was contending that Ms. Cabelleri was a member of management and was not a bargaining unit employee, fortifies our conclusion that paragraph 27 implicitly alleges that she was acting on behalf of management. Similar observations apply to the first sentence in paragraph 28, read in the context of the totality of the union's allegations. Therefore, we are unable to accept company counsel's submission that section 89(5) cannot apply to any of the allegations in paragraphs 27 and 28.

8. In support of his submission that section 89(5) does not apply to paragraphs 27 and 28, counsel for the respondent contended that an employer should not have to call an employee in the bargaining unit to discharge the "reverse onus" under section 89(5). We are unable to agree with that submission as an abstract proposition. If an employer were to use a bargaining unit employee as a conduit or agent to threaten, intimidate, coerce or otherwise deal with another employee contrary to the Act as to his employment, opportunity for employment or conditions of employment, the section 89(5) "reverse onus" might well apply to the situation. In any event, it is open to the employer to attempt to prove through members of management that they neither authorized nor condoned Ms. Cabelleri's activities. Such evidence can be presented without calling Ms. Cabelleri, although calling her as a witness might be a more expeditious and direct method of dealing with that issue. (Similar observations apply to Americo Simoes.)

9. The allegations (set forth in paragraphs 2 and 3 of union counsel's letter dated August 23, 1982) that George Miller and eighteen other employees were laid off as part of the respondent's "anti-union retaliatory program" clearly fall within the purview of section 89(5). To whatever extent (if any) the involvement of lead hand Valerie West is material to those allegations, observations similar to those set forth in the preceding paragraph of this decision apply.

10. With respect to paragraph 41, the Board's jurisprudence concerning section 79 (and the analogous provisions of *The Colleges Bargaining Act*) indicates that individual employees have no status to bring before the Board a complaint alleging a breach of that section. See, for example, *Merrymount Children's Home*, [1981] OLRB Rep. June 742, and *Fanshaw College of Applied Arts and Technology*, [1980] OLRB Rep. Apr. 433. In the *Merrymount* case, the Board suggested that section 89(5) might not be operative to establish the legal onus in a section 89 complaint based upon an alleged violation of section 79, but indicated that in the view that panel of the Board took of the case before them, it was unnecessary to decide that matter. While we agree that an individual employee has no status to bring such complaint before the Board, it does not necessarily follow that section 89(5) cannot apply where, as in the present case, a union brings before the Board a complaint in respect of an alleged violation of section 79 which is based upon an allegation that the conditions of employment of an employee (or group of employees) have been altered contrary to the Act. However, we decline to determine that issue at this stage of the present proceedings in view of that fact that



neither counsel addressed any specific submissions to us with respect to it. Should that matter ultimately require determination in these proceedings, we will address it in our decision on the merits.

11. A second matter about which the parties made submissions before the Board is the proper scope of reply evidence in “mixed onus” proceedings such as these in which the applicant bears the legal burden of proof with respect to some allegations, and the respondent bears the legal burden of proof with respect to others. Counsel for the respondent submitted that by agreeing to proceed first with its evidence, the union assumed the evidentiary onus of proceeding first with its evidence on all of the allegations, including those to which section 89(5) applies. He further submitted that the scope of the union’s right to call reply evidence in the present case is the same as the right of reply in any other case in which the union is the first party to call its evidence. Thus, it was his position that while the union could adduce reply evidence to contradict or qualify new facts or issues raised in defence, it should not be permitted to “split its case” by calling evidence in reply which properly forms part of the union’s case in chief.

12. Counsel for the union contended that his client is under no obligation to call as part of its case in chief evidence concerning allegations in respect of which section 89(5) places the legal burden of proof on the respondent. It was his submission that the applicant is entitled to rely on section 89(5) and is under no obligation to exhaust its case in chief on all of the allegations to which section 89(5) applies. Thus, he argued that the union, having called evidence concerning some of those allegations, can await the evidence of the respondent before deciding whether to call any evidence concerning the rest of those allegations. He further submitted that if this approach causes prejudice to the respondent, such prejudice can be eliminated by permitting the respondent to re-open its case so as to adduce evidence on any matters that it has not had a proper opportunity to address previously.

13. The normal scope of reply evidence is aptly described in the following passage from Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at page 517:

“At the close of the defendant’s case, the plaintiff has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence. As a general rule, however, matters which might properly be considered to form part of the plaintiff’s case in chief are to be excluded. A plaintiff is therefore precluded from dividing his evidence between his case in chief and reply, for two very practical reasons:

‘... first, the possible unfairness of an opponent who has justly supposed that the case in chief was the entire case had to meet, and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning’ [6 Wigmore on Evidence, s. 1873, p. 511].”

(See also *Allcock Laight & Westwood Limited v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 O.R. 18 (C.A.).)

14. Having carefully considered the submissions of the parties with respect to this issue, we have concluded that it is neither appropriate nor possible to attempt to delineate at this stage of the proceedings the precise scope of reply evidence which the Board would be prepared to receive in this case. Nevertheless, we will attempt to provide the parties with a general indication of the approach which we are inclined to adopt. Although none of the previous Board decisions cited to us by counsel, or which we have reviewed as a result of our own research, deals at length with this matter, it appears from the pertinent jurisprudence that the party which proceeds first with its evidence in a case in which section 89(5) applies to some but not all of the allegations, is required to adduce as part of its case in chief its evidence on all of the allegations, and not just on those allegations concerning which it bears the legal burden of proof. See, for example, *Craftline Industries*, [1977] OLRB Rep. Apr. 246, in which the Board wrote as follows (in paragraph 2):

“Certain of the alleged violations of the Act in this matter cast upon the employer the ‘reverse onus’ as set out in section 79(4a) [now section 89(5)] of the Act (i.e., the alleged violations with respect to section 58 and 61 [now 66 and 70] of the Act. The other alleged violations of the Act, i.e. sections 14, 56, 70 and 71 [now 15, 64, 79, and 80] do not call into play the ‘reverse onus’ as set out in section 79(4a) of the Act and accordingly the complainant is required to establish these alleged violations on the balance of probabilities. The respondent in this matter has asked the Board to sever those aspects of the complaint which cast the ‘reverse onus’ upon it from those aspects of the case which do not, and in the alternative the respondent has asked the Board to require the complainant to proceed first if all the alleged violations are to be heard as a single complaint. The Board is not prepared to sever the complaint along the lines suggested by counsel for the respondent. To do so would not only prove costly to the parties and to the Board, but would also prolong the time required to dispose of these serious complaints. *The Board, however, in view of its decision to hear all of the matters before it as a single complaint, and in view of the protracted time frame vis-a-vis the alleged pattern of unlawful activity, hereby declares and serves notice upon the complainant that it will be required to proceed first with its evidence with respect to all of the alleged violations.* Notwithstanding the order of procedure the Board will apply the ‘reverse onus’ as set out in section 79(4a) to those allegations to which it has application.”

(emphasis added)

Although the notion that the “reverse onus” is only called into play by certain sections of the Act has been superseded by the more recent view expressed by the Board in

*Domtar Packaging, supra*, that “section 89(5) was intended to be of benefit to persons in respect of all unfair labour practice conduct by employers affecting employment”, nothing in the *Domtar* case affects the approach which the Board has generally adopted of requiring the party that proceeds first with its evidence to proceed first with respect to all of the alleged violations, irrespective of the fact that section 89(5) may be applicable to some but not all of those allegations. Indeed, it is clearly implicit in the *Domtar* decision that having determined that the mere reliance on an allegation other than one relevant to section 89(5) should not always result in the complainant proceeding first, and having further decided that in the circumstances of that case the respondent ought to proceed first, the Board would require the respondent to proceed first with its evidence on all aspects of the case, not just on those aspects to which section 89(5) was applicable. (See, in particular, paragraph 9 of that decision, as quoted above.)

15. In the circumstances of the present case, in which the applicant agreed to proceed first with its evidence and, in doing so, led evidence concerning some but not all of its allegations, including a number of allegations to which section 89(5) unquestionably applies, the Board is of the view that it would not be appropriate to permit the applicant to split its case as it apparently seeks to do. Accordingly, the Board will not permit the applicant to adduce in reply, evidence material to the allegations that it has made, which evidence is within its power to adduce as part of its case in chief. It is, of course, open to an applicant to refrain from adducing such evidence in relation to some or all of the allegations to which section 89(5) applies and, in final argument, to rest its case with respect to those allegations solely on the basis that the evidence adduced by the respondent with respect to them has not discharged the section 89(5) burden of proof. However, if the applicant seeks to follow this course, it will not be open to it to adduce such evidence in reply, having foregone its opportunity to do so as part of its case in chief. Nevertheless, the Board recognizes that the reply evidence which may properly be adduced in proceedings such as the present case will frequently be somewhat more extensive than the reply evidence legitimately adduceable in Board proceedings to which section 89(5) does not apply, since allegations to which section 89(5) applies generally involve matters which are primarily, if not exclusively, within the knowledge of the respondent. Thus, it is certainly not beyond the realm of possibility that the respondent may adduce in support of its actions in relation to a particular employee, evidence which divulges a matter (such as an incident in that individual's employment history) about which the applicant could not reasonably have been expected to adduce evidence in chief due to its lack of knowledge that the respondent was relying upon same. This is particularly true in complaints, such as the present ones, in which the respondent's replies merely contain a blanket denial of the allegations, and do not specify the facts upon which it intends to rely in defence of its impugned actions.

16. It should also be noted that if the reply evidence adduced by the applicant is such that it becomes necessary or appropriate in the interest of a fair hearing for the respondent to be afforded an opportunity to rebut or qualify new facts or issues raised by such evidence, it is open to the Board to afford the respondent an opportunity to adduce further evidence, although this discretion must be exercised prudently to avoid unnecessarily creating a lengthy, complex and unduly fragmented four-stage procedure.



17. At the (January 20, 1983) continuation of hearing of this matter, before hearing the respondent's evidence the Board will afford the applicant an opportunity to re-open its case in chief for the purpose of adducing such further evidence as its counsel considers appropriate in light of this decision.

18. The matter is referred to the Registrar.

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**1680-82-R** United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., Applicant, v. **Zymaize Company**, Respondent, v. Group of Employees, Objectors

Certification - Petition - Originator discussing petition with management - Lawyer referred by management without solicitation - Petition linked to management during circulation - Petition rejected

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. W. Murray and B. K. Lee.

**APPEARANCES:** *Paul Cavalluzzo, Ron Lebi and Vince Gentile for the applicant; James T. Heather, David M. Davis and Larry Moss for the respondent; C. J. Abbass, Wayne R. Allan, Dale R. Northey and Allan W. Johnston for the objectors.*

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER B. K. LEE;** January 27, 1983

1. This is an application for certification.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

4. The parties met with a Board Officer on the day scheduled for hearing, and were able to resolve their disputes with respect to the composition of the bargaining unit. Having regard to the agreement of the parties, the Board finds that all employees of the respondent at London save and except Team Leaders, persons above the rank of Team Leader, engineering and laboratory staff, office and sales staff, students employed in a co-operative training programme, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. For the purpose of clarity, the Board notes the further agreement of the parties that laboratory staff working as part of a team and the stockroom attendant are included in the bargaining unit.

6. The meeting with the Board Officer also established that there were 80 employees in the bargaining unit on the date the application was filed. Of those, 55 employees signed union membership cards which the applicant filed in support of this application. That represented some 68 per cent of the bargaining unit, and would normally have entitled the applicant to certification without a vote. There was, however, also filed in this matter a timely statement in opposition to the application, signed by a number of employees who had previously signed membership cards in the applicant. If found to be voluntary, this would reduce the applicant's unequivocal membership evidence to 43, just below the 55 per cent level normally required for outright certification. The Board accordingly directed that an inquiry be held into the voluntariness of the statement in opposition, in order to ascertain whether the statement cast sufficient doubt on the full membership evidence to cause the Board to direct the taking of a representation vote.

7. The evidence discloses that the key instigator behind the statement in opposition, or "petition", was Mr. Wayne Allan. The respondent operates a facility, mostly automated, which produces sweetener products from corn. Mr. Allan is an operator in the control room, and exercises no supervisory responsibilities. The respondent's work force is divided into four teams, and Mr. Allan is a member of Team 1. These teams rotate through a shift schedule of 3 days on, followed by 3 days off, and each is under the direct supervision of a Co-ordinator, as well as a Team Leader. The Board heard virtually no evidence with respect to the responsibilities and authority of the Team Leaders, other than the fact that they assign work and make decisions with respect to the production process. Both the union in its application and the company in its reply took the position that the Team Leaders were excluded from the bargaining unit. However, the union subsequently wrote to the Board and requested that its bargaining unit description be amended to include Team Leaders. This requested amendment was posted by the respondent, at the Board's request, on its bulletin boards on December 8, 1982, seven days after the original Notice of Application was posted. At the meeting with the Board Officer which took place on the day scheduled for hearing, the union again concurred in the company's position that Team Leaders ought to be excluded, and that, as indicated above, was reflected in the bargaining-unit description finally agreed upon by all parties. There was never any dispute but that the Co-ordinators were excluded.

8. Mr. Allan testified that he became aware of the union's organizing campaign about the middle of November of 1982. For his own reasons he was opposed to the trade union coming in, and on Sunday, November 28th, telephoned his brother, who was an experienced union representative working elsewhere. Mr. Allan's brother suggested that Mr. Allan sign a union card, but ultimately explained to Mr. Allan the steps necessary in opposing an application for certification. Mr. Allan agrees that his brother cautioned him that there must not be management involvement with the petition. The next day Mr. Allan made an appointment to see the company President, Mr. Davis. He testified that his reasons for going to see Mr. Davis at that point were to see if Mr. Davis was aware of the union activity, to ascertain the progress of a new lunchroom which had been promised by Mr. Davis earlier, and to discuss the problems which employees were having in communicating with management. Asked on cross-examination why he was interested in knowing whether Mr. Davis was aware of the union activity, Mr. Allan responded by saying that Mr. Davis has an "open-door"

policy. Mr. Allan added that this was not the first time he had taken advantage of Mr. Davis' "open-door" policy to go and talk to him, but that not enough employees were taking advantage of it. Apart from the question of the "open-door" policy, however, counsel again asked Mr. Allan why he would be interested in knowing whether or not Mr. Davis was aware of the union activity. Mr. Allan responded then that Mr. Davis had just recently arrived some 9 months ago from England. Counsel pointed out to Mr. Allan that England has trade unions as well, and Mr. Allan then indicated that he simply wanted to know what Mr. Davis' personal feelings on the subject were. He went on to testify that Mr. Davis responded that it did not matter to him either way, that he could live with or without a trade union in the place. Counsel then asked Mr. Allan why, having gotten the response that he was seeking, he was not swayed by Mr. Davis' view. Mr. Allan responded that he had already made up his own mind that a union was not needed at Zymaize, and that he had only inquired about Mr. Davis' feelings because he was curious. Apart from the difficulty the Board has with the credibility of this portion of Mr. Allan's testimony standing alone, his account of Mr. Davis' response to him is also in marked contrast to the concerns Mr. Davis expressed to other employees that if the union came in, "the company would go under". At the very least, these comments of Mr. Davis further undermine the credibility before the Board of the petitioners' key organizer and witness, Mr. Allan. And beyond this, Mr. Allan agreed with counsel that the fact that he had had this meeting discussing the union in Mr. Davis' office that evening became common knowledge amongst the employees in the plant. As Mr. Allan stated: "I didn't keep that a secret".

9. The next evening after work Mr. Allan had a discussion about the union with his Co-ordinator, Mr. Paul Field. In the course of that discussion, Mr. Allan indicated that he had made up his mind to oppose the union. Mr. Field responded that Mr. Allan should get a lawyer, and gave him the name of a Mr. Nash, whom Mr. Allan understood to be the company's lawyer. Mr. Field told Mr. Allan to "just call Mr. Nash", and Mr. Allan did so. Mr. Nash indicated to Mr. Allan that he did not do that kind of work, and referred Mr. Allan to his present counsel, Mr. Abbass. Once again, Mr. Allan did not keep this encounter with management to himself, and other petitioners who testified before the Board indicated that they learned from Mr. Allan that their present lawyer had been referred through Mr. Field. Consistent with this, one of the union witnesses testified that the rumour in the plant was that the petitioners had gotten a lawyer which the company had either supplied or referred them to. More specifically, the witness testified, the rumour was that the company had referred them to a lawyer, and from that employees inferred that since no one in the petitioners' group could afford a lawyer, the company must be paying for him.

10. After the Notice of Application went up at the plant on December 1st, Mr. Allan obtained wording for his petition from Mr. Abbass, and had his girlfriend type it up. Mr. Allan began to "talk up" the idea of a petition at work even before the Notice went up, but did not begin the circulation of his petition in earnest until December 6th. With the benefit of counsel's advice, Mr. Allan and his principal assistants, Mr. Northey and Mr. Johnston, arranged to have employees who were interested in signing the petition do so away from the company's premises. In some cases employees were telephoned and then visited at their homes, but most employees signed by showing up at designated times and places which were located within a few minutes of the plant.



11. There was, as noted, some degree of confusion over the status of the "Team Leaders" in this case. Until the applicant trade union wrote to the Board seeking to amend its bargaining-unit description, it was the position of both the applicant and the respondent employer that Team Leaders were not eligible for inclusion in the bargaining unit. The union's requested alteration in the unit was not posted at the plant until December 8th, by which point the majority of the signatures on the petition had already been obtained. Counsel for the petitioners argues that the status of the Team Leaders, being at the periphery of management and the bargaining unit, would, at the very least, always have been a matter of ambiguity in minds of employees, and that there may even have been rumours in the plant prior to December 8th (as there appeared to be with everything else) that the applicant had changed its position. In terms of this "ambiguity", however, it is interesting to note that Mr. Allan himself initially testified that he never "talked up" his petition in the control room in front of Mr. McIntosh, his Team Leader. Mr. Allan agreed, in fact, that he "ensured" that Mr. McIntosh was not around at the time. It was only on being confronted with the suggestion that he had on a number of occasions engaged in general discussions with other employees about the petition in the presence of Mr. McIntosh that Mr. Allan volunteered that he did not consider Mr. McIntosh a member of management. Asked then to explain his earlier concern over discussing the petition in front of Mr. McIntosh in the control room, Mr. Allan's only response was: "He's hardly ever in it".

12. The Board must also consider the role played in this matter by Mr. Paul Watterworth. Mr. Watterworth is a member of the bargaining unit who, we are told, acts as relief Lead Hand on the occasions when the regular Lead Hand is away on vacation. On at least two occasions (though not necessarily when acting as Lead Hand) Mr. Watterworth approached other employees in the bargaining unit and harangued them for thinking about bringing the union in. Mr. Watterworth stated to them, amongst other things, that he had gone to see Mr. Garde, the Refinery Manager, Mr. Moss, the Plant Manager, and Mr. Davis, in order to discuss the question of the union. As Mr. Watterworth, from the evidence, appears to have become an active and prominent force behind the petition, these disclosures would arguably create in employees' minds a further direct link between management and the supporters of the petition. Of clearer significance, however, was a discussion which took place at the Hideaway Tavern on the evening of December 7th. The Hideaway was one of the designated spots used to obtain signatures on the petition. It is essentially divided into two areas, a bar and a dining area. Mr. Allan was there soliciting signatures that night, primarily on the dining side. On the other side at a table were Mr. Watterworth, Mr. McIntosh (Mr. Allan's Team Leader), the petitioner Dale Northey, and two employee supporters of the union. In that conversation the union supporters complained to Mr. Watterworth about having gone to Mr. Moss and Mr. Davis about the union and having "named names". Mr. Watterworth in response conceded that specific names were discussed, but he said that he did not tell management anything that he did that they did not already know. Later in that conversation Mr. McIntosh stated to the two union supporters: "A year from now the union will be gone, and so probably will half of you guys". Mr. Northey in his evidence conceded that at the time of this conversation, it was his belief that Mr. McIntosh was "excluded" from the bargaining unit.

13. The union expressed its concern as well over the extent to which the lower levels of management supervision would have been perceived by employees as playing

a role in the coordination of the off-premises petitioning activity. Mr. Allan admitted, for example, that the subject of the petition was freely discussed in front of Mr. McIntosh in the plant office which is above the control room. The plant office is the area set aside for the use of the Co-ordinators, company consultants and secretarial staff, as well as the Team Leaders, who share a desk there. Another employee, Mr. Bates, had requested permission from his co-ordinator on December 9th to leave the plant during his lunch hour, for the purpose (which he did not state) of attending at the time and place designated for the signing of the petition. Upon Mr. Bates' return, he went to the plant office to advise Mr. Fleming, his Co-ordinator, that he was back, and found Mr. Fleming sitting with Mr. Watterworth and Mr. McIntosh. Without Mr. Bates saying anything, Mr. McIntosh volunteered that he had meant to get a hold of the petitioners to wait for Mr. Bates so that he could sign the petition. The union also points to the fact that Mr. Johnston, one of the other circulators of the petition, asked permission of his Lead Hand to leave the plant 15 minutes early on December 1st. He volunteered to his Lead Hand that his purpose for wishing to leave was to collect signatures on the petition at the plaza. Permission was granted without further discussion, although Mr. Johnston points out that such an occurrence was to him no different than the number of occasions on which he has asked for and received permission to leave early in order to attend a baseball game. The only concern, Mr. Johnston points out, is whether his work area is adequately covered. Mr. Johnston adds that it was, from a work point of view, more important that he be at the plaza early to relieve Mr. Northey, as the arrangement for that shift is that Mr. Northey arrives a few minutes ahead of the normal starting time in order to liaise directly with the outgoing operator. On this latter point, however, the Board notes that the evidence of Mr. Northey was that he in fact reported to work five minutes late that evening, and nothing was said to him.

14. The relevance of petitions such as we now have before us arises from the Board's discretion under the latter part of section 7(2) of the *Labour Relations Act*. That section provides:

If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

The Board has interpreted its own discretion in a way which will permit employees who have signed union cards an opportunity to register with the Board an apparent "change of mind", through "petitions" or statements in opposition to the union's application. If, through this mechanism, a sufficient number of employees' true wishes are cast in doubt, the Board normally will seek the confirmatory evidence of a representation vote, no matter what strength of support is demonstrated for the union by its card count. But to refuse to fully accept the union's cards at face value, the Board must be presented with evidence having at least a reasonable measure of probative value.

15. There are certain facts of the work place to which a labour relations tribunal must turn its mind when confronted with an issue such as the present, and these are

summarized in general terms in the Board's recent decision in *Baltimore Aircoil Interamerican* [1982] OLRB Rep. Oct. 1387, particularly at paragraphs 40 and 41:

40. ... Before reviewing each of these issues it is useful to understand the general legal and policy background against which petitions are considered by this Board. There is usually and naturally an identity of interest between an employer and those of his employees interested in opposing an applicant trade union. In this context the circulation of a statement of desire involves petitioners approaching their fellow employees to solicit support. Understandably, an employee so approached may worry or feel anxious that his refusal to sign such a petition will become known to his employer given this natural interest employers have in employees opposing the trade union. But, this identity in interest between employer and opposing employees, standing alone, has never been viewed by this Board as undermining the reliability of signatures placed on a circulated petition. If this were not so, a petition could never be found to be voluntary. On the other hand, this is not to say that a similarity in interest between employer and petitioners is irrelevant and, indeed it is the reason why this Board subjects the origination and circulation of a statement of desire in opposition to an application for certification to considerable scrutiny. There is an onus on those employees who present the documentary evidence to the Board to demonstrate that the signatures contained therein constitute a voluntary expression of the wishes of those employees who on a recent and earlier occasion joined the applicant trade union. It is in this context that the Board, in the often cited *Pigott Motors (1961) Ltd.* case, 63 CLLC ¶16,264, made the following observation:

The *Labour Relations Act* contains detailed provisions designed to protect the rights of employees to become members of, and to select or reject a particular or any trade union as their collective bargaining agent and to bargain collectively or individually with their employer. It is an important function and duty of this Board under the legislation to be circumspect and vigilant to see that these rights are preserved and not made illusory.

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences,



obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document, such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories. (See for instance, the *Sinnott News Case*, CCH Canadian Labour Law Reporter, 1955-59, Transfer Binder ¶16,114 at p. 12,209, and the *Fleck Manufacturing Ltd. Case*, CCH Canadian Labour Law Reporter, vol. 1, ¶16,236, at p. 13,201). In seeking this assurance, the Board draws no distinction between documents which purport to express a desire on the part of employees to resign from the union and those which purport merely to express opposition to the applicant as their collective bargaining agent. In other words, for this purpose, it does not seek to distinguish between the two matters of membership and representation.

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

The petitioners argue that it is unreasonable for the Board to place a higher onus on those opposing the union than those supporting it. But this argument overlooks the reality of the situation, in terms of where the average employee expects the employer's sympathy to lie. To the extent, therefore, that the employer possesses over employees a degree of power and authority which has the ready potential to undermine the voluntary expression of employee wishes, it is incumbent on employees asking their colleagues to register support *against* a union's application to take reasonable steps to distance themselves from the hand (and eye) of management. Given as a starting point that the

employer's and petitioners' objectives will normally be perceived by employees to be coincident, the test becomes, as counsel for the petitioners themselves pointed out, whether the carriers of the petition would appear to employees to be acting in their own interest, rather than on behalf of or in connection with management. Compare, e.g., *A. N. Shaw Limited*, [1980] OLRB Rep. Oct. 1347, at paragraph 10. If the latter, with that would flow a natural fear in the minds of employees that management would come to know who did or did not sign the petition. Compare, e.g., *Morgan Adhesives*, [1975] OLRB Rep. Nov. 809, at paragraph 31.

16. Viewed in this perspective, the problems with Mr. Allan's petition become self-evident. Mr. Allan *knew* from his brother-in-law that management must not be involved in an anti-union petition. Yet his first step was to go to Mr. Davis to discuss it. He then made this visit common knowledge in the plant, and a few days later emerged as the sponsor of the petition. The lawyer he retained came through an unsolicited referral from the company, and this fact as well managed to find its way around the plant. On this latter point the Board observed in *Baltimore Aircoil*, *supra*, at paragraph 45:

45. The next issue is Mr. Leyte's admission that he may have told up to ten employees that his lawyer's name had been suggested by the employer. We are of the view that this admission is fatal. To advise other employees that the lawyer representing the petitioners was suggested by the employer could reasonably create a direct link between the petitioners and the employer in the minds of employees approached by the petitioner.

17. In addition in this case we have the aggressive involvement against the petition of Mr. McIntosh, whose relationship to management was at the very least ambiguous in employees' minds, as well as the apparent tolerances granted to individuals arriving late or leaving early as a result of petitioning activity. This latter point is of only limited significance, in light of the fact that these employees are salaried and there appears to be some history of flexibility in work hours. But one has to be struck by the openness with which the petitioning activity was being discussed with various members of management, which, together with these tolerances, would reasonably give the average employee the impression that management was intimately caught up in the co-ordination of the petition.

18. But the real problem remains the puzzling conduct of the petition's main proponent, Mr. Allan himself; and Mr. Allan's lack of credibility before the Board does nothing to alleviate the problem. We find that Mr. Allan, for whatever motive, openly established in the minds of employees a link between the petition and company management, and that employees in the circumstances would reasonably fear that management would ultimately come to know who had or had not agreed to sign the petition. The fear, in other words, would be that management would be made aware of particular employees' declarations of sympathy, and this fear would have been reinforced by Mr. Watterworth's claim that management was already aware of the names of employees who supported the union. In all of the circumstances, the Board finds it impossible to place any weight on the fact that employees placed their signatures on Mr. Allan's petition, and the petition will accordingly not affect the

applicant's position. Mr. Abbass argued for the petitioners, in the alternative, that even if the Board were to reject the petition, it ought to consider exercising its discretion to order a vote if the Board found that the petition had to be rejected for reasons beyond the petitioners' control. Whatever may be the merits (or basis) of such an argument, this case clearly would not fit into that category.

19. Based on all of the material before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on December 9, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. A certificate will issue to the applicant.

#### **DECISION OF J. W. MURRAY, BOARD MEMBER;**

1. I disagree with the majority and would have ordered a vote be taken.

2. The Board provides fairly wide latitude for employees to express their wishes. In this case I do not find any coercion, or management involvement in the taking of the petition, particularly when one looks at the totality of any such activity.

3. The beginning of the petition activity appears to have started November 29th, a few days before the posting of the "green sheet" or notice of the union's application for certification. Since it is a relatively small plant, the rumours of union organizing activity, and even petition activity, seems to have been well known. There was no evidence presented which indicated that the company had initiated or indeed taken part, for or against, in either activity. The posting of the "green sheet" was the first notice that many employees had of the status of the union's organizing campaign. Those employees interested in a petition thus had a deadline set for them and proceeded to meet it. I do not sense any sudden change of heart.

4. Any alleged management involvement with the petition was of no significance in the overall picture and indeed amounted to no more than civil answers to questions asked by one or two employees. Short of refusing to answer, there was no contact at all by management in the petition.

5. I would find the petition valid and would have ordered a vote, since it represents an expression of real doubt by a significant group of employees, which would be clarified by a vote.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DECEMBER 1982

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**1699-81-R:** Canadian Union of Public Employees, (Applicant) v. The Sudbury and District Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Regional Municipality of Sudbury, save and except Executive Director, Program Directors, Program Managers, persons above the rank of Program Director and Manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Sudbury regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Executive Director, Program Directors, Program Managers, persons above the rank of Program Director and Manager, and office and clerical staff." (5 employees in unit).

**1910-81-R:** Canadian Union of Public Employees, (Applicant) v. Saga Canadian Management Services Limited, (Respondent).

Unit #1: "all employees of the respondent working at Laurentian University in Sudbury, Ontario, save and except food service director, food service manager, assistant pub manager, secretary, persons regularly employed for not more than twenty-four (24) hours per week, and student employees covered by the subsisting Collective Bargaining Agreement between the parties." (41 employees in unit).

Unit #2: See, (*Bargaining Agents Certified Subsequent to a Post Hearing Vote*).

**0351-82-R:** Ontario Public Service Employees Union, (Applicant) v. Taylor Ambulance Service, (Respondent).

Unit: "all employees of the respondent in the Town of Sutton and the Village of Queensville, save and except office staff and owner/operator." (15 employees in unit). (*Having regard to the agreement of the parties*).

**0388-82-R:** United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. Panache Rotisseurs Inc. operating under the name and style of "St. Hubert Bar-B-Q", (Respondent).

Unit: "all employees of the respondent at its location at 1633 The Queensway in Metropolitan Toronto, Ontario, save and except the unit manager, unit assistant manager, dining room manager, assistant managers, and persons above those ranks, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (17 employees in unit).

**0580-82-R:** Fur, Leather, Shoe & Allied Workers' Union, Local 82 affiliated with the United Food & Commercial Workers' International Union, AFL, CIO, CLC, (Applicant) v. Royal Leather Goods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its plant in Metropolitan Toronto, save and except foremen, foreladies and supervisors, persons above the rank of foreman, forelady or supervisor, shippers, receivers, drivers, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (68 employees in unit).. (*Having regard to the agreement of the parties*).

**0839-82-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Manor Cleaners Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of St. Catharines, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, clerical and sales staff, drivers, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (31 employees in unit). (31 employees in unit).

**0849-82-R:** Labourers' International Union of North America, Local 527, (Applicant) v. Choctaw Construction Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector save and except non-working foremen and persons above the rank of non-working foreman." (54 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (54 employees in unit).

**1148-82-R:** Christian Labour Association of Canada, (Applicant) v. Vision Rest Home, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Sarnia, save and except registered nurses supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (4 employees in unit). (*Having regard to the agreement of the parties*).

**1169-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Midway Sales (1979) Ltd., Lansard Bros. Ltd., (Respondents).

Unit #1: "all carpenters and carpenters' apprentices in the employ of Midway Sales (1979) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of Midway Sales (1979) Ltd. in the District of Kenora, including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1172-82-R:** Service Employees Union, Local 478, (Applicant) v. Leisure' World Nursing Homes Limited, (Respondent).

Unit #1: "all registered and graduate nurses regularly employed by the respondent at North Bay, save and except the Director of Nursing, the Assistant Director of Nursing and all those regularly employed for not more than twenty-four (24) hours per week." (3 employees in unit).



Unit #2: “all registered and graduate nurses regularly employed by the respondent at North Bay for not more than twenty-four hours per week save and except the Director of Nursing and the Assistant Director of Nursing.” (4 employees in unit).

**1201-82-R:** Canadian Union of Public Employees, (Applicant) v. Crothall Services Limited, (Respondent).

Unit #1: “all employees of the respondent in the City of Kingston save and except manager, those above the rank of manager, and persons regularly employed for not more than twenty-four (24) hours per week.” (2 employees in unit).

Unit #2: (*See Applications for Certification Dismissed – No Vote Conducted*)

**1310-82-R:** Ontario Public Service Employees Union, (Applicant) v. Sudbury Memorial Hospital, (Respondent).

Unit: “all medical laboratory technologists, medical laboratory assistants, radiology technicians, radiology assistants of the respondent at Sudbury regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.” (24 employees in unit).

**1364-82-R:** Labourers’ International Union of North America, Local 183, AAP v. J. D. S. Investments Limited, (Respondent) v. Labourers’ International Union of North America, Local 506, (Intervener).

Unit: “all construction Labourers employed by the respondent in the residential sector of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.” (32 employees in unit).

**1398-82-R:** Ontario Public Service Employees Union, (Applicant) v. Owen Sound General and Marine Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: “all paramedical employees of the respondent at Owen Sound, save and except chief laboratory technologist; technical director of diagnostic imaging; chief radiology technologist; director of rehabilitation therapy, manager of physiotherapy, manager of occupational therapy, manager of speech pathology and audiology; director of food services; assistant director of pharmacy; director of medical records; assistant director of medical records; director of social work; chief E.C.G. technician; chief nuclear medicine technologist; director of respiratory technology; director of psychology; physicians; students employed during the school vacation period, persons regularly employed for not more than twenty-four (24) hours per week and persons covered by the subsisting collective agreements between the respondent and the applicant; between the respondent and Canadian Union of Public Employees; and between the respondent and Ontario Nurses’ Association.” (104 employees in unit).

**1408-82-R:** ESSA Staff Union (ESU), (Applicant) v. The Economists’, Sociologists’ and Statisticians’ Association, (Respondent).

Unit: “all employees of the respondent in the City of Ottawa save and except President and persons above the rank of President.” (4 employees in unit). (*Having regard to the agreement of the parties*).

**1480-82-R:** Teamsters Local Union 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. MI Movers International Transport Services Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga, save and except supervisors, those above the rank of supervisor, office and sales staff." (14 employees in unit). (*Having regard to the agreement of the parties*).

**1551-82-R:** Ontario Public Service Employees Union, (Applicant) v. Manitoulin Health Centre, (Respondent).

Unit: "all paramedical employees of the respondent at Little Current, Ontario, save and except Chief Laboratory Technologist, Chief Radiology Technologist, Director of Medical Records, persons above the rank of Chief Laboratory Technologist, Chief Radiology Technologist and Director of Medical Records, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1560-82-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. H. E. Vannatter Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Wallaceburg, Ontario, save and except foremen, persons above the rank of foreman, office, clerical, engineering staff, sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (50 employees in unit). (*Having regard to the agreement of the parties*).

**1571-82-R:** Service Employees Union, Local 183, AFL, CIO, CLC, (Applicant) v. Bond's Ambulance Service, (Respondent).

Unit: "all employees of the respondent in Picton, Ontario, save and except supervisors and persons above the rank of supervisor." (9 employees in unit). (*Having regard to the agreement of the parties*).

**1586-82-R:** International Brotherhood of Electrical Workers Local Union 1687, (Applicant) v. Roberts Electric (1981) Incorporated, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

**1588-82-R:** Ontario Public Service Employees Union, (Applicant) v. Ottawa General Hospital, (Respondent).

Unit: "all medical laboratory technologists of the respondent at Ottawa regularly employed for not more than twenty-four (24) hours per week and students employed as medical technologists during the school vacation period, save and except laboratory scientists, clerical staff and persons covered by subsisting collective agreements." (27 employees in unit).

**1589-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Norvin Construction Limited and Zuckerbrot & Associates Ltd., (Respondents).

Unit #1: "all construction labourers in the employ of Norvin Construction Limited and Zuckerbrot & Associates Ltd. in the industrial, commercial and institutional sector of the

construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of Norvin Construction Limited and Zuckerbrot & Associates Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1598-82-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Reform Development Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills, and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

**1605-82-R:** The International Association of Machinists and Aerospace Workers, (Applicant) v. Franklin Prouse Motors (1962) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Sault Ste. Marie, save and except foremen, supervisors, persons above the rank of foreman or supervisor, office staff, service salesmen, sales staff and outside parts wholesale salesmen." (21 employees in unit). (*Clarity Note*)

**1608-82-R:** United Steelworkers of America, (Applicant) v. General Refractories Co. of Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Smithville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and persons covered by a subsisting collective agreement." (13 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1622-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Lunar Frame and Woodworking Co. Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*).

**1625-82-R:** Energy and Chemical Workers Union, (Applicant) v. Dynamic Disposal Trucking, Rothsay Division of Maple Leaf Mills Limited, (Respondent) v. Employees, (Objectors).

Unit: "all employees of the respondent working at or out of the facility in Elmira, save and except supervisors, persons above the rank of supervisor, office staff and salesmen." (7 employees in unit).



**1626-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Peel Condominium Corporation No. 143, (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 3025 Credit Woodland, Mississauga, Ontario, including resident superintendents, save and except property manager, office and clerical staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1649-82-R:** Canadian Union of Public Employees, (Applicant) v. Corporation of the City of Kanata, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Kanata, save and except City Clerk, Director of Parks and Recreation, those above the rank of City Clerk and Director of Parks and Recreation, Administrative Co-ordinator, those persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and those persons covered by subsisting collective agreements." (56 employees in unit). (*Having regard to the agreement of the parties*).

**1650-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. E. Ibbotson Excavating and Grading, (Respondent).

Unit #1: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton, and Alnwick in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**1659-82-R:** General Workers Union, Local 1030 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Canada Veneers Ltd., (Respondent).

Unit: "all employees of the respondent in Pembroke, Ontario, save and except office and sales staff, foremen, persons above the rank of foreman and employees who are regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement." (12 employees in unit).

**1663-82-R:** Service Employees International Union, Local 663 AFL, CIO, CLC, (Applicant) v. Lennox and Addington County General Hospital Association, (Respondent).

Unit #1: "all office and clerical employees of the respondent in Napanee, Ontario, save and except paramedical personnel, registered and graduate nurses, supervisors, persons above the rank of supervisor, secretary to the administrator, secretary to the director of nursing, senior accounting clerk, accounts receivable/payable clerk, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (14 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Napanee, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except paramedical personnel, registered and graduate nurses, supervisors, persons above the

rank of supervisor, secretary to the administrator, secretary to the director of nursing, senior accounting clerk, accounts receivable/payable clerk and persons covered by subsisting collective agreements.” (4 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1691-82-R:** Canadian Union of Public Employees, (Applicant) v. Crothall Services Limited, (Respondent).

Unit: “all employees of the respondent regularly employed for not more than twenty-four (24) hours per week in the City of Kingston, save and except manager and those above the rank of manager and excepting employees covered by subsisting collective agreements.” (4 employees in unit).

**1694-82-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers Local 304, (Applicant) v. S & H Fabricating Canada Inc., (Respondent).

Unit: “all employees of the respondent in Cambridge save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (20 employees in unit). (*Having regard to the agreement of the parties*).

**1695-82-R:** International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. Pro Interior Systems Incorporated, (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit). (*Clarity Note*).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit). (*Clarity Note*).

**1696-82-R:** United Steelworkers of America, (Applicant) v. Pure Metal Galvanizing, Division of P.M.T. Industries Limited, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (69 employees in unit). (*Having regard to the agreement of the parties*).

**1700-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Dominion Coal-Building Supplies Ltd., (Respondent).

Unit: “all employees of the respondent at Unionville, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (3 employees in unit). (*Having regard to the agreement of the parties*).

**1701-82-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. 489795 Ontario Ltd. o/a Mike Gal’s Truck Service, (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen and parts manager, those above the rank of foreman and parts manager, office and sales staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

**1703-82-R:** United Food and Commercial Workers International Union, Local 725, (Applicant) v. Tyrebuck Enterprises Limited c.o.b. as Roman's II Health and Recreation Spa, (Respondent).

Unit: "all employees of the respondent at 742 Bay Street, Toronto, save and except shift supervisors, persons above the rank of shift supervisor, masseurs, office and sales staff, those persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*).

**1704-82-R:** Canadian Union of Public Employees, (Applicant) v. The Regional Municipality of Hamilton-Wentworth, (Respondent).

Unit: "all office and clerical employees of the respondent at its Helping Hands facility in the Regional Municipality of Hamilton-Wentworth, save and except the project manager, persons above the rank of such rank and persons covered by subsisting collective agreements." (6 employees in unit). (*Having regard to the agreement of the parties*).

**1707-82-R:** Ontario Public Service Employees Union, (Applicant) v. Lennox & Addington Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent in Napanee, Ontario save and except Director of ARC Industries, Director of Residential Care, and persons above such rank; office and clerical employees and persons regularly employed for not more than twenty-four (24) hours per week." (7 employees in unit). (*Having regard to the agreement of the parties*).

**1728-82-R:** International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Pelbro Drywall Ltd., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1751-82-R:** International Union of Bricklayers & Allied Craftsmen Local 30 Belleville, Ontario, (Applicant) v. Joe Defosse and Associates, (Respondent).

Unit #1: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all bricklayers and bricklayers' apprentices in the employ of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and



institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

**1756-82-R:** Labourers' International Union of North America, Local 527, (Applicant) v. Agostino Masonry Co. Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

### Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

**1377-82-R:** The Energy and Chemical Workers Union CLC, (Applicant) v. St. Lawrence Cement Inc., operating as Dufferin Aggregates, (Respondent). v. United Cement, Lime and Gypsum and Allied Workers International Union AFL, CIO, CLC' (Intervener).

Unit: "all employees of the respondent at its Quarry operation known as Dufferin Quarry, Esquesing Township, save and except foremen, persons above the rank of foreman and office staff." (34 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		34
Number of persons who cast ballots	34	
Number of ballots marked in favour of applicant		18
Number of ballots marked in favour of intervener		15
Ballots segregated and not counted		1

**1410-82-R:** United Headwear, Optical and Allied Workers Union of Canada, Local 4, (Applicant) v. Plastic Contact Lens Company (Canada) Ltd., (Respondent).

Unit: "all employees of the respondent in its departments in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week." (60 employees in unit).

Number of persons on revised voters' list		60
Number of persons who cast ballots	54	
Number of ballots marked in favour of applicant		53
Number of ballots marked in favour of intervener		1

**1411-82-R:** United Headwear, Optical and Allied Workers Union of Canada, Local 4, (Applicant) v. Imperial Optical Company Limited, (Respondent).

Unit: "all employees of the respondent in its Engineering Division at 365 Dundas Street East in Metropolitan Toronto and in its Stationery Department, Tone Ray Department and Lens Warehouse Departments at 80-90 Sherbourne Street in Metropolitan Toronto, save and except foremen, foreladies, those above the rank of foreman or forelady, office and sales staff, and students employed during the school vacation period." (29 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on revised voters' list		29
Number of persons who cast ballots	23	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		17
Number of ballots marked against of intervener		5

**1433-82-R:** International Union of Operating Engineers, Local 796, (Applicant) v. General Motors of Canada Ltd. (Windsor Transmission Plant), (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener).

Unit: "all stationary engineers and trainees employed by the respondent in its power house at its Transmission Plant at Windsor, Ontario, save and except chief engineers, supervisory employees and all other employees not specifically included in this unit." (16 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant		14
Number of ballots marked in favour of intervener		1

**1448-82-R:** The Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Cathcart Truck Lines (Toronto) Ltd., (Respondent) v. The Canadian Transportation Workers Union Nos. 188, 199, 200 N.C.C.L., (Intervener).

Unit: "all employees classified as drivers, dockmen, checkers, maintenance men and mechanics employed at or out of the respondent's terminal or terminals situated at Metropolitan Toronto, City of Hamilton, in the County of Wentworth, and the City of London, in the County of Middlesex." (44 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		44
Number of persons who cast ballots	39	
Number of ballots marked in favour of applicant		35
Number of ballots marked in favour of intervener		4

**1468-82-R:** The Energy and Chemical Workers Union, CLC, (Applicant) v. 3M Canada Inc., Industrial Mineral Products Division, (Respondent) v. United Cement, Lime, Gypsum and Allied Workers International Union, AFL, CIO, CLC, (Intervener).

Unit: "all employees of the respondent in the Township of Belmont – Methuen, save and except foremen, persons above the rank of foreman, office staff, laboratory staff, and watchmen." (90 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		90
Number of persons who cast ballots	80	
Number of ballots marked in favour of applicant		64
Number of ballots marked in favour of intervener		16

**1509-82-R:** Canadian Union of Operating Engineers & General Workers, (Applicant) v. Olympia & York Developments Limited, (Respondent) v. International Union of Operating Engineers, Local 796, (Intervener).

Unit: "all mechanical maintenance employees of the respondent engaged in maintenance services and plant operations at L'Esplanade Laurier, Ottawa, save and except assistant superintendent, persons above the rank of assistant superintendent, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (11 employees in unit).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		11
Number of ballots marked in favour of intervener		0

**1516-82-R:** London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. St. Mary's General Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent at Kitchener regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (61 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		59
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		14

### **Bargaining Agents Certified Subsequent to a Post Hearing Vote**

**1910-81-R:** Canadian Union of Public Employees, (Applicant) v. Saga Canadian Management Services Limited, (Respondent).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*)

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period at Laurentian University in Sudbury, save and except Food Service Director and Food Service Manager." (29 employees in unit).

Number of names of persons on revised voters' list		52
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant		19
Number of ballots marked against applicant		9
Ballots segregated and not counted		1

**1187-82-R:** Copeland Refrigeration Independent Employees' Association, (Applicant) v. Copeland Refrigeration of Canada Limited, (Respondent) v. International Union of Electrical Radio and Machine Workers AFL, CIL, CLC, (Intervener).

Unit: "all employees of the respondent at Brantford save and except foremen, persons above the rank of foreman and office and sales staff." (29 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		29
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant		24
Number of ballots marked in favour of intervener		5

**1482-82-R:** Hotel, Restaurant and Cafeteria Employees Local 75, (Applicant) v. Ramada Inn (Downtown) Toronto, (Respondent).

Unit: "all employees of the respondent at the Ramada Inn Downtown, 111 Carlton Street, Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and



sales staff and persons covered by an existing collective agreement between the applicant and the respondent." (32 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		32
Number of persons who cast ballots	31	
Number of ballots marked in favour of applicant		19
Number of ballots marked against applicant		12

### Applications for Certification Dismissed – No Vote Conducted

**1201-82-R:** Canadian Union of Public Employees, (Applicant) v. Crothall Services Limited, (Respondent). (2 employees in unit).

Unit #1: (*See: Bargaining Agents Certified – No Vote Conducted*)

**1304-82-R:** Hotel, Restaurant & Cafeteria Employees, Local 75, (Applicant) v. Orangeroot Hotels Limited, Howard Johnsons Airport Hotel, (Respondent). (00 employees in unit).

**1702-82-R:** Canadian Union of Public Employees, (Applicant) v. Queensway General Hospital, (Respondent). (257 employees in unit).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**0223-82-R:** The Canadian Union of Educational Workers, (Applicant) v. Queen's University at Kingston, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent engaged in teaching, tutoring, marking, demonstrating, lecturing, or who are employed as research assistants, who are enrolled as students in a regularly degree program at Queen's University at Kingston, and who are paid out of operating funds; save and except those covered by existing collective agreements or who are regular faculty." (614 employees in unit).

Number of names of persons on revised voters' list		1,055
Number of persons who cast ballots	690	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		218
Number of ballots marked against applicant		415
Ballots segregated and not counted		18

### APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1105-82-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), (Applicant) v. Moe Campbell Lincoln Mercury Sales (1981) Limited, (Respondent).

**1535-82-R:** Service Employees Union, Local 204, affiliated with the AFL, CIO, CLC, (Applicant) v. The Governing Council of the University of Toronto, (Respondent).

**1540-82-R:** International Plate Printers, Die Stampers and Engravers Union of North America, (Applicant) v. Ontario Bank Note Co. Ltd., (Respondent) v. Toronto Typographical Union No. 91 (ITU), (Intervener).

**1563-82-R:** The Nabet Staff Union, (Applicant) v. The National Association of Broadcast Employees and Technicians CLC, (Respondent).

**1600-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. Kelly Gibson, Contractor, (Respondent).

**1682-82-R:** Toronto Printing Pressmen & Assistants' Union Local 10 Subordinate to International Printing and Graphic Communications Union, (Applicant) v. Ronalds Printing Co., a division of Ronalds Federated Limited, (Respondent).

**1821-82-R:** Labourers' International Union of North America, Local 1059, (Applicant) v. Kent County Contractors Division of 504961 Ontario Limited, (Respondent).

**1828-82-R:** United Brotherhood of Carpenters & Joiners of America Local 494, (Applicant) v. Brierwood Construction Limited MCI Management Inc., (Respondents).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**0573-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Western Ontario Drywall Limited and J.A. MacDonald (London) Limited, (Respondent). (*Withdrawn*)

**0914-82-R:** International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Mandic Bros. Drywall & Const. Ltd., and 387098 Ontario Limited, (Respondents). (*Granted*)

## SALE OF A BUSINESS

**2302-81-R:** Commercial Workers Unions, Local 486, (Applicant) v. Steinberg Inc., and Yesteryear Grocers Inc., (Respondents) v. Group of Employees, (Objectors). (*Granted*)

**2661-81-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 195, (Applicant) v. Emerick Plastics Inc., (Respondent). (*Withdrawn*)

**0572-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Western Ontario Drywall Limited and J.A. MacDonald (London) Limited, (Respondents). (*Withdrawn*)

**1077-82-R:** United Food and Commercial Workers International Union Local 725, (Applicant) v. Steinberg Inc., Genesco of Canada Co. Ltd., J.A. Johnston Ltd., (Respondent). (*Withdrawn*)

**1216-82-R:** Christian Labour Association of Canada, (Applicant) v. Carroll Electric (1982) Limited and J. B. Carroll Electric Limited, (Respondents). (*Granted*)

**1421-82-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (formerly the Laundry, Dry Cleaning and Dye House Workers International Union Local 351), (Applicant) v. 480754 Ontario Inc. trading under the name of Cartwright Drapery Cleaners, (Respondent). (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0092-82-R:** Concetta Fallico and all of the undersigned, (Applicants) v. International Ladies' Garment Workers' Union, (Respondent) v. Third Dimension Mfg. Ltd., (Intervener). (*Dismissed*)

**1069-82-R:** Doris Armstrong, (Applicant) v. Service Employees Union, Local 204, AFL, CIO, CLC, (Respondent) v. K Mart Canada Limited, (Respondent).

Unit: "all employees of the Employer employed at its K Mart store at Albion Road Shopping Centre in the Municipality of Metropolitan Toronto, Ontario, save and except department managers, persons above the rank of department managers, management trainees, pharmacists, students employed during the school vacation period and regularly employed for not more than twenty-four (24) hours per week." (*Granted*)

Number of names of persons on list as originally prepared by employer		65
Number of persons who cast ballots	64	
Number of ballots marked in favour of applicant		16
Number of ballots marked against applicant		48

**1217-82-R:** The Employees of J & A Cartage Ltd., (Respondent) v. Teamsters Union Local 938, (Respondent) v. J & A Cartage Ltd., (Intervener).

Unit: "all employees of J & A Cartage Ltd. in the Municipality of Metropolitan Toronto save and except dispatcher, persons above the rank of dispatcher, office and sales staff." (*Granted*)

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		9

**1246-82-R:** Douglas Hawkins, Patrick C. Clark, Valerie Fox, Gerry McCurley, Benoit J. Gallant, Fred J. Hobin, Wildred V. Hunt, Audley Monteith, Keith Kimsa, (Applicants) v. Toronto Printing Pressman and Asst. Union Local #10, (Respondent) v. Brown & Collett Limited, (Intervener).

Unit: "all pressmen, assistant pressmen, cameramen, compositors, preparatory workers and their apprentices, save and except non-working foremen and those above the rank of non-working foreman, employed in the plant of Brown & Collett Limited, located in Metropolitan Toronto." (*Granted*)

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		9

**1256-82-R:** John Donald Clark, (Applicant) v. Canadian Union of Operating Engineers and General Workers, (Respondent). (*Dismissed*)

**1347-82-R:** Tony Suchy and others, (Applicants) v. United Electrical, Radio and Machine Workers of America (UE), (Respondent) v. Speedex Manufacturing, a division of 514209 Ontario Inc., (Intervener). (*Granted*)

**1440-82-R:** Lawrence Watt, (Applicant) v. International Woodworkers of America Local 2-1000 (Office Employees), (Respondent). (*Withdrawn*)



**1459-82-R:** Werner Peter Licis, (Applicant) v. Teamsters Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. T. Puckrin & Son Ltd., (Intervener). (*Dismissed*)

**1554-82-R:** Walter E. Harris, (Applicant) v. Teamsters Local Union 230, (Respondent). (*Withdrawn*)

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE**

**1647-82-U:** Catalytic Enterprises Limited, (Applicant) v. International Brotherhood of Painters and Allied Trades, Local 1590; Gary Ireland, Ron Bourgue, et al. (Respondents). (*Withdrawn*)

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)**

**0956-82-U:** J. A. Norton Co. Limited, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Bill Howard, Sean O’Ryan, Harold Haden, et al, (Respondents). (*Withdrawn*)

**1648-82-U:** MHG/DB Catalytic Joint Venture, (Applicant) v. International Brotherhood of Painters and Allied Trades, Local 1590; et al, (Respondents). (*Withdrawn*)

## **COMPLAINTS OF UNFAIR LABOUR PRACTICE**

**2620-81-U:** Kevin Ward on behalf of himself and Darcy Foran, George Freund, Leonard Paris, Chandar B. Singh, Gordon Reid, Randy Russell, Robert Gregory, Steve Gordon, Terrence Eastman, and Eric Ondrade, (Complainants) v. International Union of United Plant Guard Workers of America, Amalgamated Local 1962, (Respondent) v. Governing Council of the University of Toronto, (Intervener). (*Dismissed*)

**2662-81-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 195, (Complainant) v. Emrick Plastics Inc., (Respondent). (*Withdrawn*)

**0519-82-U:** Kenneth Chisholm, Martin Gray, Russell Czech, Ronald Scott and Michael Taylor, (Complainants) v. Dominion Citrus and Drug Ltd., (Respondent). (*Granted*)

**0562-82-U:** Gary Michael Gushulak, (Complainant) v. International Labour Union Local 607, (Respondent). (*Withdrawn*)

**0717-82-U:** Labourers International Union of North America, Local 697, (Complainant) v. Tamarron Group Inc., (Respondent). (*Granted*)

**0748-82-U:** Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Complainant) v. Movel Restaurants Limited, c.o.b. as Movenpick Restaurants of Switzerland, (Respondent). (*Granted*)

**0840-82-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Complainant) v. Manor Cleanors Limited, (Respondent). (*Granted*)

**0854-82-U; 0912-82-U:** Health, Office & Professional Employees, a division of Local 206, Retail Commercial & Industrial Union, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Sweetbriar Nursing Home Township of Sunnydale, Simcoe County, (Respondent). (*Withdrawn*)

**0969-82-U; 1070-82-U:** United Food and Commercial Workers International Union, Local 1000A, (Complainant) v. Keele-Wilson Supermarket Limited c.o.b. as Tops Food Market, (Respondent). (*Withdrawn*)

**1106-82-U; 1107-82-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), (Complainant) v. Moe Campbell Lincoln Mercury Sales Limited, (Respondent). (*Withdrawn*)

**1142-82-U:** Canadian Union of Brewery Flour, Cereal Soft Drink and Distillery Workers, Local 304, (Complainant) v. Canada Trustco Mortgage Company, (Respondent). (*Withdrawn*)

**1144-82-U:** Kenneth Kean, (Complainant) v. Teamsters Local 419, (Respondent) v. W.M.I. Waste Management of Canada Inc., (Intervener). (*Dismissed*)

**1214-82-U:** United Steelworkers of America, (Applicant) v. The Adams Mine, Cliffs of Canada Ltd., Manager, (Respondent). (*Dismissed*)

**1252-82-U:** International Association of Machinists and Aerospace Workers, (Complainant) v. Treco Machine & Tool Limited, (Respondent) v. Group of Employees, (Intervener). (*Granted*)

**1295-82-U:** United Steelworkers of America, (Complainant) v. Kelson Spring Products Limited Kenneth Sernaker, (Respondent). (*Granted*)

**1345-82-U:** Leabert Cole, (Complainant) v. United Auto Workers Local 124, (Respondent). (*Withdrawn*)

**1372-82-U:** Labourers' International Union of North America, Local 183, (Complainant) v. Stan Vine Construction Limited and/or 286287 Ontario Limited, (Respondent). (*Withdrawn*)

**1406-82-U:** United Steelworkers of America, (Complainant) v. Daf-Indal Ltd., (Respondent). (*Withdrawn*)

**1430-82-U:** Helene Elizabeth Bulavy, (Complainant) v. Brother Vivian Ward and Local 777 Sunnybrook Hospital Employee's Union, (Respondent). (*Withdrawn*)

**1450-82-U; 1456-82-U:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Dominion Coal-Building Supplies Ltd., (Respondent). (*Withdrawn*)

**1487-82-U:** William Lewis, (Complainant) v. International Association of Machinists & Aerospace Workers, (Respondent). (*Withdrawn*)

**1504-82-U:** Peggy Moore, (Complainant) v. Service Employee's Union, Local 210, (Respondent). (*Withdrawn*)

**1510-82-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees, International Union Local 251, (Complainant) v. Ramada Renaissance Hotel, (Respondent). (*Withdrawn*)

**1512-82-U:** Giles A. R. D'Souza, (Complainant) v. Steel Workers Local 1111, (Respondent). *(Withdrawn)*

**1515-82-U:** Ontario Nurses' Association, (Complainant) v. Brouillette's Manor Limited, (Respondent) v. Service Employees Union, Local 210, (Intervener). *(Withdrawn)*

**1531-82-U:** United Steelworkers of America, (Complainant) v. Montebello Metal Inc., (Respondent). *(Withdrawn)*

**1539-82-U:** Canadian Union of Public Employees, (Complainant) v. Kingston and District Association for the Mentally Retarded, (Respondent). *(Withdrawn)*

**1543-82-U:** Donald Tebow, (Complainant) v. Champion Road Machinery and International Association of Machinists and Aerospace Workers, Local 1863, (Respondents). *(Withdrawn)*

**1549-82-U:** Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Complainant) v. Ramada Inn, (Respondent). *(Withdrawn)*

**1567-82-U:** Service Employees Union, Local 204, (Complainant) v. Leisure World Nursing Homes Limited, (Respondent). *(Withdrawn)*

**1575-82-U:** Miriam Tourangeau, (Complainant) v. Service Employees Union, Local 210, (Respondent). *(Dismissed)*

**1576-82-U:** Robert Scott Eatough, (Complainant) v. Local No. 1285 U.A.W., (Respondent). *(Withdrawn)*

**1607-82-U:** Mary Smith and Sandra Howard, (Complainants) v. Plastics Surface Finishers Limited and Ljuba Veselinovic, plant manager and Brenda Koehler, supervisor, and others, (Respondent). *(Dismissed)*

**1609-82-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Ideal Plumbing Supplies Inc., (Respondent). *(Withdrawn)*

**1628-82-U:** Thomas Latto, (Complainant) v. Bruno Teichmann, (Respondent). *(Withdrawn)*

**1637-82-U:** Hotel Employees and Restaurant Employees Union, Local 75, (Complainant) v. Ramada Renaissance Hotel, (Respondent). *(Withdrawn)*

**1638-82-U:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen Local 12, Kitchener, (Applicant) v. The Masonry Industry Employees Council of Ontario and Leo-Jan Masonry Limited, (Respondent). *(Withdrawn)*

**1654-82-U:** Canadian Union of Public Employees, and its Local 6, (Applicant) v. The Corporation of the Town of Valley East, (Respondent). *(Withdrawn)*

**1655-82-U:** Peter George, (Complainant) v. United Steelworkers of America Local 2859, Babcock & Wilcox Ind. Ltd., (Respondents). *(Withdrawn)*

**1658-82-U:** Retail, Wholesale & Department Store Union, AFL, CIO, CLC, (Complainant) v. Horseshoe Inn Motel operated by Diamond Motel (London) Ltd., (Respondent). *(Withdrawn)*



**1686-82-U:** W. Phillips, (Complainant) v. Lawson Flexible Packaging Ltd., (Respondent). (*Withdrawn*)

**1690-82-U:** Ontario Nurses' Association, (Complainant) v. Welland County General Hospital, (Respondent). (*Withdrawn*)

**1692-82-U:** Christian Labour Association of Canada, (Complainant) v. Intercounty Concrete Products Ltd., (Respondent). (*Withdrawn*)

**1722-82-U:** International Brotherhood of Electrical Workers, Local 1687, (Complainant) v. Roberts Electric Inc., (Respondent). (*Withdrawn*)

**1724-82-U:** Maria Freitas, (Complainant) v. Bittner Packers Limited, (Respondent). (*Withdrawn*)

**1726-82-U:** International Association of Machinists & Aerospace Workers, (Complainant) v. Treco Machine & Tool Ltd., (Respondent). (*Withdrawn*)

**1735-82-U:** Bradley B. Crichton, (Complainant) v. International Union & its Local UAW 195 Windsor, Ontario, (Respondent). (*Withdrawn*)

**1754-82-U:** Christian Labour Association of Canada, (Complainant) v. Intercounty Concrete Products Ltd., (Respondent). (*Withdrawn*)

**1755-82-U:** Georgina Murphy, (Complainant) v. R.W.D.S.U.-Retail, Wholesale Dept., Store Union, (Respondent). (*Withdrawn*)

**1770-82-U:** Labourers' International Union of North America Local 506, (Applicant) v. Ontario Masonry Contractors Association W. F. Murray Masonry Inc., (Respondent). (*Withdrawn*)

**1797-82-U:** Food and Service Workers of Canada, (Complainant) v. Abbey Carpet Cleaning Services (a division of Abbey National Holdings Limited), (Respondent). (*Withdrawn*)

## APPLICATIONS FOR CONSENT TO PROSECUTE

**1657-82-U:** Retail, Wholesale & Department Store Union, AFL, CIO, CLC, (Applicant) v. Horseshoe Inn Motel operated by Diamond Motel (London) Ltd., (Respondent). (*Withdrawn*)

## JURISDICTIONAL DISPUTES

**2334-81-JD:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 759, (Complaint) v. Comstock International Ltd. (Mid Western Division) and United Association of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628, (Respondent) v. Construction Site Teamster Employer Bargaining Agency, (Intervener) v. United Association, Local 628, (Intervener). (*Withdrawn*)

**2522-81-JD:** Stoney Creek Mechanical Limited, (Complainant) v. Sheet Metal Workers' International Association Local Union No. 537, The Millwright District Council of Ontario,

United Brotherhood of Carpenters and Joiners of America, Local Union No. 1007, The Iron Workers District Council of Ontario and International Association of Bridge, Structural and Ornamental Iron Workers Local Union 736, International Brotherhood of Boilermakers Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Respondents) v. Ontario Sheet Metal and Air Handling Group, (Intervener). (*Dismissed*)

**1301-82-JD:** Wm. J. Broome Limited, (Complainant) v. The International Union of Bricklayers and Allied Craftsmen and its Local 10 and The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and The International Brotherhood of Painters and Allied Trades, The Ontario Council of the International Brotherhood of Painters and Allied Trades, The International Brotherhood of Painters and Allied Trades, Local 1891, (Respondents). (*Withdrawn*)

## **APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS**

**0560-82-M:** Service Employees Union, Local 268, (Applicant) v. Thunder Bay Ambulance Services, Inc., (Respondent). (*Dismissed*)

**1151-82-M:** Canadian Union of Public Employees, Local 101, (Applicant) v. The Corporation of the City of London, (Respondent). (*Dismissed*)

## **COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT**

**1071-82-OH:** Terry Burroughs, (Complainant) v. Petrosar Ltd., (Respondent). (*Withdrawn*)

## **CONSTRUCTION INDUSTRY GRIEVANCES**

**1963-81-M:** International Association of Bridge, Structural and Ornamental Ironworkers Local Union 759, (Applicant) v. Comstock International Ltd. Mid-Western Division, (Respondents) v. Construction Site Teamster Employer Bargaining Agency, (Intervener). (*Withdrawn*)

**0264-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Climb Formwork, (Respondent). (*Withdrawn*)

**0785-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Pumpcrete, (Respondent). (*Granted*)

**0879-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Nadrofsky Corporation, (Respondent). (*Dismissed*)

**0991-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 446, v. W. A. Stephenson Construction Company, (Respondent). (*Withdrawn*)

**1088-82-M:** Labourers' International Union of North America Local 183, (Applicant) v. C.D.C. Contracting, a division of Patron Contracting Limited, (Respondent). (*Granted*)

**1426-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Starnino Construction Co. Ltd., (Respondent). (*Withdrawn*)

**1502-82-M:** Teamsters Local Union 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, (Applicant) v. Bot Construction (Canada) Limited, (Respondent). (*Dismissed*)

**1536-82-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. Incom Construction 1977 Ltd., (Respondent). (*Withdrawn*)

**1537-82-M:** Roy Construction and Supply Company Limited, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 2486, (Respondent). (*Withdrawn*)

**1564-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. K. A. Mace Limited, (Respondent). (*Granted*)

**1565-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Andrew Paving & Engineering Limited, (Respondent). (*Granted*)

**1565-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Boston Excavating & Grading Company Limited, (Respondent). (*Granted*)

**1568-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. Bradsil Limited, (Respondent). (*Withdrawn*)

**1580-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Ambassador Marble, Tile and Carpet Ltd., (Respondent). (*Withdrawn*)

**1581-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Essex Tile & Carpet Company, (Respondent). (*Granted*)

**1595-82-M:** Local 10, the International Union of Bricklayers and Allied Craftsmen, and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Ellis Don Limited, (Respondent). (*Withdrawn*)

**1604-82-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, (Applicant) v. 364846 Ontario Limited (Alumex Installations) Antamex Limited, (Respondent). (*Withdrawn*)

**1615-82-M:** Labourers' International Union of North America, Local 527, (Applicant) v. William S. Burnside (Canada) Limited, (Respondent). (*Withdrawn*)

**1623-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Climb Formwork, (Respondent). (*Granted*)

**1624-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. L & M Caulking Co. Ltd., (Respondent). (*Granted*)

**1631-82-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. 447365 Ontario Limited, (Respondent). (*Withdrawn*)

**1632-82-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Ralph M. Moore Industrial Installations, (Respondent). (*Withdrawn*)



**1639-82-M:** The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*)

**1640-82-M:** Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Tri-Cont Projects Limited, (Respondent). (*Withdrawn*)

**1642-82-M:** The Ontario Provincial Council United Brotherhood of Carpenters and Joiners of America, and Local 249 Kingston Ont., (Applicant) v. Grandma Lee's of Canada Ltd., (Respondent). (*Withdrawn*)

**1653-82-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. Gorgi, A. Masonry (1976) Limited, (Respondent). (*Withdrawn*)

**1656-82-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Exhibit and Display Association of Canada Chair-Man Mills Ltd., (Respondent). (*Withdrawn*)

**1660-82-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Mount Royal Concrete Floor (Canada) Ltd., (Respondent). (*Granted*)

**1667-82-M:** Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. A. B. & B. Corporation Limited, (Respondent). (*Withdrawn*)

**1668-82-M:** Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. Richvale Heating & Cooling Company Limited, (Respondent). (*Withdrawn*)

**1669-82-M:** Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. 401588 Ontario Inc. c.o.b. as G.T.S. Mechanical Service, (Respondent). (*Granted*)

**1670-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Newtec Construction Ltd., (Respondent). (*Granted*)

**1671-82-M:** Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada, (Applicant) v. Doey Gravel and Construction Limited, (Respondent). (*Withdrawn*)

**1705-82-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Toronto Construction Association and Climb Formwork Limited, (Respondent). (*Withdrawn*)

**1706-82-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. McKay Cocker Construction Limited, (Respondent). (*Withdrawn*)

**1710-82-M:** Labourers' International Union of North America, Local 527, (Applicant) v. V. K. Mason Construction Ltd., (Respondent). (*Granted*)

**1720-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. General Store Builders, (Respondent). (*Withdrawn*)

**1721-82-M:** Labourers' International Union of North America, Local 607, (Applicant) v. Rino Zanette Ltd., (Respondent). (*Withdrawn*)

**1738-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Standard Drywall Limited, (Respondent). (*Withdrawn*)

**1740-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 387098 Ontario Limited, (Respondent). (*Withdrawn*)

**1746-82-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Torus Construction Limited, (Respondent). (*Withdrawn*)

**1757-82-M:** The Form Work Council of Ontario, (Applicant) v. 464734 Ontario Inc., (Respondent). (*Granted*)

**1759-82-M:** International Union of Bricklayers and Allied Craftsmen, Local 1, (Applicant) v. James Kemp Construction Limited, (Respondent). (*Withdrawn*)

**1762-82-M:** The Form Work Council of Ontario, (Applicant) v. Parkburn Construction Ltd., (Respondent). (*Granted*)

**1822-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Acoustique Piche Inc., (Respondent). (*Withdrawn*)

**1866-82-M:** Labourers' International Union of North America, Local 1081, (Applicant) v. A. Gorgi Masonry (1976) Limited, (Respondent). (*Withdrawn*)

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**2064-78-R:** The Carpenters' District Council of Toronto on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 2482, 3227, and 3233, (Applicant) v. A J Fish & Son Limited, (Respondent). (*Dismissed*)

**1790-79-U; 2040-80-U:** United Steelworkers of America, (Complainant) v. Fotomat Canada Limited, (Respondent). (*Granted*)

**0109-82-R:** United Steelworkers of America, (Applicant) v. U S L Industries Inc., (Respondent). (*Dismissed*)

**0838-82-R:** Bryce Teed, (Applicant) v. International Molders and Allied Workers Union, Local 28, (Respondent). (*Dismissed*)

*Ontario Labour Relations Board,  
400 University Avenue,  
Toronto, Ontario*

ISSN 0383-4778





# Decisions

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the  
Ontario Labour Relations Board

Cited [1983] OLRB REP. FEBRUARY

Selected decisions of particular reference value are  
also reported in *Canadian Labour Relations Boards  
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**2718-80-R** Service Employees Union, Local 204 Affiliated with the A. F. of L., C.I.O., C.L.C. Applicant v. **Bestview Holdings Limited** and Bestview Services Limited Respondents v. Christian Labour Association of Canada Intervener

**Bargaining Unit – Certification – Practice and Procedure – Respondent's nursing homes operated autonomously and geographically dispersed in different cities – Incumbent union having multi-location agreement covering single comprehensive unit for many years – No evidence of collective bargaining problems – Board finding incumbent's unit appropriate for purposes of applicant's displacement application**

*[Editor's Note: This decision was inadvertently omitted from the September, 1981 issue of the Report. However, it is of sufficient importance to be published at this time.]*

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members C. A. Ballentine and J. D. Bell.

**APPEARANCES:** J. Sack, Joe Aggimenti for the Applicant; George Longo for the Respondent; W. R. Herridge, Q.C., J. Adema and F. Kuntz for the Intervener.

**DECISION OF THE BOARD;** September 2, 1981

# I

1. This is an application for certification.

• • •

2. The Board notes the agreement of the parties that for the purposes of this application, and pursuant to section 1(4) of *The Labour Relations Act*, the Board should find and declare that Bestview Holdings Limited and Bestview Services Limited are one employer.

3. The applicant ("The S.E.I.U.") is seeking to be certified as the bargaining agent for certain employees of the respondent employed at its nursing home on Main Street in the City of Toronto. The incumbent union, ("CLAC"), the intervener in this application, contends that this group of employees does not comprise a unit of employees appropriate for collective bargaining. It argues that the appropriate bargaining unit is its existing "comprehensive" unit including all employees of the respondent represented by CLAC at its Sarnia, St. Catharines, Toronto, Markham, Orillia and Newmarket locations. All of these employees, it argues are currently part of a single bargaining unit covered by a single collective agreement. This extended area bargaining structure has been in place and has operated effectively for some years.

4. The applicant requested that a prehearing vote be taken, and by a decision dated March 31, 1981 the Board acceded to that request. The vote was conducted in a voting constituency framed with reference only to the Toronto location, and excluding from the voters' list certain casual employees who work less than five (5) hours per day

or fifteen (15) hours per week. (This exclusion paraphrases an agreed "part-time-casual" exclusion contained in the current collective agreement between CLAC and the respondent.) The Board further directed that the ballot box be sealed until such time as the parties had the opportunity to make their representations on the bargaining unit issue. A hearing for this purpose was held on May 25, 1981.

5. Bestview Services Limited and Bestview Holdings Limited are two related companies which operate a number of nursing homes in the Province of Ontario, and have a variety of collective bargaining relationships with various unions. Bestview Services usually employs the kitchen, housekeeping and laundry staff. Bestview Holdings usually employs the non-registered nursing staff, physiotherapists, and craft employees. The reason for this mode of organization was not dealt with by the parties herein, but, in any case, at any particular nursing home, the functions of these employees are fully integrated and they work side by side. That is the situation in Toronto.

6. CLAC was certified as the bargaining agent for the employees of Bestview Holdings in Toronto (but not those of Bestview Services) in January 1974. Subsequently, the parties extended these bargaining rights by voluntary recognition to the employees of Bestview Services and concluded a collective agreement covering only the Toronto location. This agreement was in effect from February 1974 to January 1975.

7. The bargaining rights at the other locations are also founded upon a combination of Ontario Labour Relations Board certificates, and voluntary recognition arrangements. There are certificates for the employees of Bestview Holdings at Sarnia, St. Catharines, Markham and Toronto. Bestview Holdings extended voluntary recognition for its employees at Newmarket. There was a certificate in April 1974 for the employees of Bestview Services at Orillia. Bestview Services extended voluntary recognition for its employees at Sarnia, Marham, Toronto and Newmarket. It is this diverse group of employees which the intervener claims is covered by the "multilocation" agreement. The evidence does not disclose the number of employees involved in each location. Membership in the intervener is voluntary. There is no evidence as to the number of employees at the Toronto location who are members. Some two-thirds are members of the applicant. The first comprehensive agreement went into operation in June of 1975, and it has been followed by two further agreements in the same general terms.

8. The respondent's various nursing homes are geographically dispersed and operate relatively autonomously. There is little employee interchange and day to day labour relations problems are handled locally. The negotiation process, in contrast, is much more centralized. There is a single unified bargaining committee composed of two representatives from each of the homes. The union formulates a single set of proposals. The outcome of negotiations is incorporated in a single written document which is applied uniformly to all of the locations. If the parties are unable to resolve their differences, the matters in dispute are referred to a single interest arbitration. If a tentative agreement is reached, it is ratified by a secret ballot vote conducted at each location, in which the outcome depends upon the wishes of an overall majority. In other words, the views of a local majority can be overruled by the greater collectivity.

This feature of the bargaining is entirely inconsistent with the notion that the process is one of mere "co-ordinated bargaining" between the respondent and a group of separate bargaining units, culminating in a series of separate but identical collective agreements.

9. The terms of the current collective agreement are sometimes equivocal, but they generally tend to support the position taken by the intervenor. The preamble and recognition clauses read as follows:

## *ARTICLE 2 - RECOGNITION*

2.01 The Employer recognizes the Union as the sole bargaining agent for and this Collective Agreement shall apply to all employees as outlined in the "Preamble", and as specified in Schedule "B", attached hereto and made part hereof, save and except supervisors, persons above the rank of supervisor, and casual employees who regularly work less than five (5) hours in any one day and not more than fifteen (15) hours in any one week.

2.02 a) "Full time" employee means an employee in the bargaining unit who regularly works twenty-two and one-half (22.5) hours or more per week.

b) "Part time" employee means an employee in the bargaining unit who regularly works less than twenty-two and one-half (22.5) hours per week.

c) "Casual employee" means an employee who regularly works less than five (5) hours in any one day and not more than fifteen (15) hours in any one week.

2.05 The Employer shall not subcontract work for the purpose of causing bargaining unit personnel to be laid off or to work fewer hours than they would normally work. Prior to any subcontracting of work by the Employer there shall be a full and thorough discussion with representatives of the Union and if reasonably possible the Employer shall make arrangements to transfer any employee who would otherwise be laid off to another job or to another home.

## *PREAMBLE*

WHEREAS the Ontario Labour Relations Board did on the following dates and at the following locations:

March 27, 1973	Sarnia, Ontario
May 2, 1973	St. Catharines, Ontario
August 3, 1973	Markham, Ontario
January 18, 1974	Toronto, Ontario

certify the Union as the bargaining agent for certain employees of Bestview Holdings Limited;

AND WHEREAS Bestview Holdings Limited has voluntarily recognized the Union as the bargaining agent for certain employees in the following location:

Newmarket, Ontario	October 1, 1974
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AND WHEREAS Bestview Holdings Limited has voluntarily recognized the Union as the bargaining agent for certain employees in the following locations:

Sarnia, Ontario  
 Markham, Ontario  
 Toronto, Ontario  
 Newmarket, Ontario

AND WHEREAS the Ontario Labour Relations Board did on the following date and at the following location:

April 4, 1974

Orillia, Ontario

certify the Union as the bargaining agent for certain employees of Bestview Services Limited;

AND WHEREAS the parties hereto have agreed to enter into a collective bargaining agreement upon the terms hereinafter set forth;

In addition to article 2.05, articles 8 and 13 also envisage transfers to other locations. These references together with the repetition of clauses referring to "the bargaining unit" (singular) suggest an intention to create a single comprehensive unit within which certain employee rights would prevail. While there is evidence that job vacancies are only posted locally, and a strict reading of the agreement might indicate that a broader based posting is required, this practice is not surprising given the geographic dispersion of the employees in the unit. On balance, we are satisfied that the parties intended to create a single unit - albeit a bargaining unit with complete local autonomy in the administration of the terms of the agreement. In this respect, the situation in the present case must be distinguished from that in *Milltronics Limited* [1980] OLRB Rep. January 56; *Ontario Hydro* [1978] OLRB Rep. August 754; *Hickeson-Langs Supply Company* [1978] OLRB Rep. April 285; where the Board found that a single document either included two separate bargaining units, or was properly considered to be two separate collective agreements. None of these decisions assist the applicant in the present case.

10. The central issue raised by this case, of course, is whether a union representing a dissatisfied minority, will be permitted to "fragment" an established bargaining unit or "carve out" only the particular group in which it can establish majority support. This, in turn, highlights the tension inherent in the concept of the bargaining unit itself, for it serves two quite distinct functions: it is a major element in the procedure by which trade unions secure representation rights; and it sets the framework within which collective bargaining will be conducted for the indefinite future. These two uses of the "unit" may well give rise to controversy as they have in the present case. The optimal structure for long range negotiations may be quite different from the grouping within which an applicant union can obtain majority support in the short run (whether on an initial or "displacement" certification application). The statutory policy is to encourage the evolution of orderly collective bargaining and to avoid unnecessary industrial conflict. These goals may well involve the encouragement of preservation of broader based bargaining structures. If the parties

themselves move in this direction by amalgamating the patchwork quilt of bargaining structures which arise from individual unit determinations, so much the better – especially since this Board does not have the power to consolidate bargaining structures possessed by other Boards in other jurisdictions. In the circumstances, the Board should not lightly interfere with what the parties have created.

11. Extended area bargaining arrangements are common and can provide real benefits for both employers and employees. From the employee perspective, a broader unit permits access to job opportunities which arise at other locations, and may facilitate solutions to problems which are unmanageable at the local level. A larger employee group, for example, may significantly reduce the cost, and thus enhance the availability of insurance schemes or other similar fringe benefits. From the employer point of view, a broader based bargaining unit promotes uniformity and stability, and avoids both “whip-sawing”, and dislocation should one part of an integrated operation go on strike. From a public policy perspective, multiplication of the number of bargaining situations increases the likelihood of a strike, as does interunion rivalry, “leap-frogging” or other forms of competitive bargaining. In such situations distortions in the labour market can easily occur, and rationalization of the wage structure is much more difficult to achieve.

12. The issue raised by the present case is not novel. There are a number of recent decisions of the Board touching on this question. None of them assist the applicant. It will be convenient to refer to only two of them.

13. In *Miltronics (supra)* the applicant sought to displace an incumbent trade union in what the latter characterized as a consolidated bargaining unit encompassing both plant and office employees. The Board had initially issued a separate certificate for each employee group, but both the incumbent union and the respondent employer argued that these had been superseded by the parties’ bargaining practice. The Board ultimately found that the plant and office unit continued to be recognized as separate entities under the collective agreement, and, as such, continued to constitute a separate appropriate unit for the purposes of collective bargaining; however, in making this finding the Board commented upon the weight to be given the established bargaining structure:

“On an application for certification the Board is required to determine the unit of employees which is appropriate for collective bargaining. Where one trade union is seeking to displace another, however, the established bargaining structure is *prima facie* appropriate – particularly if it has been established by the parties themselves through collective bargaining, and continued through the years over several collective agreements. Indeed, what better evidence of “appropriateness” could there be than a pre-existing bargaining structure which the parties have developed themselves and have adapted to their own bargaining circumstances. The Board has been reluctant to fragment an established bargaining structure or to “carve out” groups of employees from such structure. The Board will generally find the appropriate bargaining unit to be that which the incumbent presently represents; although, of course, in appro-

appropriate circumstances, a larger unit may also be appropriate and could be granted without raising any concern about fragmentation. Usually, however, a "raiding union" must "take" what the incumbent union has. Here the Board has certified two separate units and the parties have maintained their separate identity in their collective agreement. We are fully satisfied that the "plant unit" standing by itself, is a unit of employees appropriate for collective bargaining. This is not a case in which the Board has made a determination of appropriateness and the parties have afterwards, through a series of negotiations, created a new collective bargaining regime. If such were the case the Board might very well give such subsequent bargaining practice more weight than our original determination of appropriateness made on the initial application for certification.

14. A much more definitive view was expressed in *Ontario Hydro* [1980] OLRB Rep. June 882. There a union sought to carve out the employees at Hydro's nuclear installations from a long-established province-wide bargaining unit. The Board expressed considerable doubt that the union would be able to establish the appropriateness of the unit which it sought.

"It is against this background then that we must determine whether the pre-hearing vote requested by the applicant should be directed. The first issue is whether the province-wide unit described in the CUPE Local 1000 is the only appropriate unit and in support of this proposition the respondent and intervener directed our attention to a number of decisions including: *Roland Lefebvre Limited* [1966] OLRB Rep. May 140; *Toronto Star Limited* [1974] OLRB Rep. July 416; *Harding Carpets Limited* [1975] OLRB Rep. July 566 (where the applicant successfully intervened on the basis of the doctrine); *The Wellesley Hospital* [1976] OLRB Rep. Feb. 46; *The Canadian Red Cross Society Blood Transfusion Service* [1978] OLRB Rep. May 408. This principle is not to be lightly dismissed. Where parties have established the viability of a bargaining unit through actual bargaining and where the history of such bargaining has been relatively satisfactory, this Board ought not to encourage fragmentation. Moreover, in these cases, the Board is not dealing with employees who are unrepresented by a trade union. Thus, more concern can be given to the most viable unit from a collective bargaining viewpoint without the risk of impeding the initial organization of employees attempting to engage in bargaining. But the principle cannot be without its exceptions. Section 48 of the Act clearly envisages displacement applications which are less extensive than preexisting bargaining units. *While there is a strong presumption in favour of the incumbent trade union's bargaining unit, the Board is willing to entertain evidence and submissions on why the status quo ought not to be maintained. The incumbent trade union may clearly have failed to represent a distinct and cohesive group adequately, a problem that has sometimes reared its head in the relationship of skilled and unskilled employees. This problem of*



*unsatisfactory representation may be combined with a capacity in the employer to tolerate somewhat greater fragmentation, particularly if the smaller unit sought can meet the principles of appropriateness generally applied to certification cases.* In the case at hand, the applicant indicated its intent to adduce evidence on the distinctive nature of Hydro's nuclear energy facilities; on the common training and conditions of employment of the affected employees; and on the manner in which they have been represented by CUPE Local 1000. The unit relied upon by the intervener and the employer is not one that the Board would normally grant and the intervener, itself, never had to organize all the affected employees. Against this background, we are not prepared to say at this time that the applicant will be unable to make out a case justifying the unit it has requested. On the other hand, the applicant's chances for success based on its answers to the Board's probing and against the background of all that we have reviewed above, cannot be characterized as substantial."

15. To these considerations, a final one may be added: the importance of certainty and predictability in the processing of representation applications. It is in the interests of all parties, including an applicant union, to know with some certainty the bargaining unit configuration which the Board will likely find to be appropriate. It is that group of employees which a raiding union must seek to organize, and within which it must establish majority support. The practical value of the rule that a raiding union must usually take the bargaining unit as it finds it, is that it clearly defines the relevant employee grouping for organizing purposes. If the Board were to readily depart from this approach, there would be no such certainty; and, the prospect that temporary minority dissatisfactions could be translated into fragmentation of an established unit, would simply encourage inter union rivalry and complicate the litigation where one union is seeking to displace another. Thus, there are real practical and administrative advantages to the rule that the existing bargaining structure should generally be preserved.

16. The established bargaining unit (i.e. the one defined in the current collective agreement between CLAC and Bestview) has been constructed by the bargaining parties, and has been in place for some years. There is no evidence of any collective bargaining problems arising from it. It is clearly an "appropriate bargaining unit" within the meaning of section 6(1) of the Act. Moreover, in *Ontario Hydro (supra)*, the Board clearly and definitively enunciated its policy in respect of displacement applications: the existing bargaining unit configuration is *presumptively* appropriate, and will be maintained unless there are good reasons for altering the *status quo*. Such reasons might include inadequacy of representation by the incumbent union or collective bargaining difficulties generated by the established structure. It is not enough to show that some smaller employee grouping may also be appropriate. In the instant case there is no indication that the Toronto group was swept unwillingly into the broader unit (a factor to which the Board adverted in *Canadian Red Cross* [1978] OLRB Rep. May 408), or that the incumbent has failed to pursue their claims or grievances. The applicant led no evidence with respect to these matters. This is not the first agreement embodying the extended bargaining structure, where one might argue that it is artificial



to give much weight to the *status quo*. On the basis of the evidence before us, and having regard to the decision of the Board in *Ontario Hydro* we see no reason for finding a bargaining unit different from that specified (above) in the current agreement between CLAC and the respondent.

17. Having regard to the forgoing, the Board further finds that less than 35% of the employees in the bargaining unit, were members of the applicant on the date the application was made. Accordingly this application must be dismissed. The registrar is directed to destroy the ballots cast in the representation vote.

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**1601-82-U Erwin Fisher, Complainant, v. Ontario Taxi Association, Local 1688 C.L.C., Respondent, v. Blue Line Taxi Company Limited, Employer**

**Duty of Fair Referral – Duty of Fair Representation – Unfair Labour Practice – Taxi driver outside scope clause in agreement not employee in bargaining unit – Having no standing to file unfair representation complaint – Union maintaining list of those wishing to obtain spots at airports – Not hiring hall attracting duty of fair referral**

**BEFORE:** N. B. Satterfield, Vice-Chairman, and Board Members C. A. Ballentine and J. A. Ronson.

**APPEARANCES:** *Erwin Fisher and T. Norton for the complainant; Ralph Ortlieb, Len Ruel and Joseph H. Nazem for the respondent; E. Rovet, W. French and J. Kramer for the employer.*

**DECISION OF THE BOARD;** February 4, 1983

1. This is a complaint made under section 89 of the *Labour Relations Act* alleging that the respondent trade union has violated sections 68, 69 and 70 of the Act.

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3. This is an interim decision dealing with preliminary issues which arose at the hearing. There are two issues: first, whether the complainant, Erwin Fisher, is an employee in the bargaining unit described in the collective agreement between the union and the employer; and, whether the respondent trade union, pursuant to that agreement, is engaged in the selection, referral, assignment, designation or scheduling of persons to employment. Since the answer to the first issue would determine whether Fisher was eligible to bring a complaint alleging violation of section 68 of the Act and the answer to the second issue would determine whether there was a basis for bringing the complaint against the union alleging violation of Section 69, the Board ruled that it would hear the evidence and argument of the parties with respect to the two

preliminary issues in order to determine whether the Board should hear the complaint on its merits with respect to the alleged violations of sections 68 and 69 of the Act.

4. The Board heard the evidence and representations of the parties on the two preliminary issues and, after adjourning to consider their evidence and representations, the Board rendered the following decision orally at the hearing:

- (a) With respect to the preliminary issue of whether Fisher is an employee in the bargaining unit described in the collective agreement between the union and the employer, the Board finds that clause 2.01 – Union Recognition of the collective agreement includes only persons licensed as taxi owners by the Township Gloucester. Fisher is a taxi driver and *not* an owner. The wording and meaning of the clause is clear and its meaning is reinforced by the definition of employees in article 1(a) of the agreement. There is nothing in the evidence before the Board which would substantiate that the parties to the agreement have by practice or by any other means amended the Union Recognition clause. In the result, Fisher is not an employee in the bargaining unit who is represented by a trade union and, therefore, is ineligible to bring a complaint under section 68 of the Act.
- (b) With respect to the question of whether the respondent trade union is engaged, pursuant to the collective agreement, in the selection, referral, assignment, designation or scheduling of persons to employment, the agreement is absent any specific provision for such referral system. The Board has considered the evidence with respect to the list maintained by the union of drivers who have expressed a wish to obtain spots at the Ottawa Airport as they become available. It has considered also the evidence surrounding how that list came to be maintained by the union and how it has been used during the term of the current collective agreement. That evidence, taken together with Article 6 – Seniority, Article 7 – Stand Rents and Article 17 – Transferability of Vehicles, fails to establish that a referral system operates under the collective agreement. Therefore the Board finds that the union is *not* engaged, pursuant to the collective agreement, in the selection, referral, assignment, designation or scheduling of persons to employment. Accordingly, there is no basis on which a cause of action can be brought against the respondent trade union with respect to section 69 of the Act.
- (c) Having regard for the findings in items (a) and (b), this complaint is dismissed with respect to the alleged violations of sections 68 and 69 of the *Labour Relations Act*.

- (d) There remains the allegation that the respondent trade union has violated section 70 of the Act. This matter with respect to the alleged violation of section 70 will be scheduled for continuation of hearing on a date to be set by the Registrar unless the complainant advises the Board that it no longer wishes to pursue the matter. If the complainant does wish to pursue that part of the complaint, unless it supplies to the respondent trade union in reasonable time prior to the hearing, further particulars as to the acts or omissions which it alleges form the violation of section 70, the complainant will be restricted to calling evidence on the allegations as particularized in the complaint.
5. The decision given orally in the hearing by the Board is hereby confirmed.
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**0012-82-JD** United Paperworkers International Union AFL-CIO (CLC) Kenora Local 1330, Complainant, v. **Boise Cascade Canada Ltd.**, and International Union of Operating Engineers, Local 940, Respondent

**Jurisdictional Dispute** – Work in dispute involving moving of wood using rubber-tired hydraulic equipment – Work previously performed by operating engineers using cranes – New equipment not requiring skill of operating engineer – Whether work belonging to operating engineers’ or paperworkers’ members

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

**APPEARANCES:** *Lewis Gottheil, Lyle Hudson, and others for the complainant; Fred Grigsby and Garry B. Whitta for International Union of Operating Engineers, Local 940; Jim Harty for Boise Cascade Canada Ltd.*

**DECISION OF THE BOARD;** February 25, 1983

1. This is a complaint under section 91 of the *Labour Relations Act* wherein the complainant has requested that the Board issue a direction with respect to the assignment of certain work.
2. This complaint concerns the operation of certain motorized equipment “not requiring an operating engineers ticket” at the Kenora mill of Boise Cascade Canada Ltd., (“the company”). The company has assigned the operation of the equipment to employees working under the jurisdiction of Local 940 of the International Union of Operating Engineers (“the Operating Engineers’ Union”) whereas the applicant, United Paperworkers International Union, Local 1330 claims that the work should come within its jurisdiction.



3. All parties are in agreement that the work in dispute can be described as follows:

“The handling, loading, ground transportation, and unloading of all pulp wood to and at the Woodroom site and in and from all other areas of the Mill complex and to the production sites of the Mill by means of motorized equipment, including rubber-tired front end loaders with grapple equipment, not requiring an operating engineers ticket.”

4. The Operating Engineers' Union bases its claim to the work largely on the basis that the equipment is being used to perform functions which had previously been performed by cranes operated by its members. The Local 1330 of the Paperworkers' Union does not deny that the equipment is being used in this way, but contends that the relevant history goes back prior to the time that cranes were introduced to the mill.

5. At the hearing several witnesses described United Paperworkers International Union, Local 1330 as being “the successor” to the International Brotherhood of Pulp, Sulphite and Paper Mill Workers Local 133, which first entered into a collective agreement with the company during or about 1923. For ease of reference we will refer to both unions simply as “the Paperworkers' Union”. The Board heard direct evidence concerning how the company carried on its operations from approximately 1934 to date. The evidence indicates that throughout the 1930's and 1940's the only company employees involved in the movement of wood were members of the Paperworkers' Union. Most of the wood was received in the summertime by way of a water route into Rideout Bay. Members of the Paperworkers' Union then moved the wood by hand and with the assistance of jackladders. Wood that was not required immediately was stored in piles for later use. Some wood was brought to the mill by local farmers and by train. Although the farmers unloaded their own loads, the train cars were unloaded by hand by members of the Paperworkers' Union.

6. The evidence does not indicate precisely when it was that cranes were introduced into the mill. It is clear, however, that by the early 1950's a large electric crane was being used in connection with a woodpile. This crane replaced a conveyor which had been operated by members of the Paperworkers' Union. By the mid 1950's the company was also using two large “American cranes” mounted on rails. These cranes were used to place wood into storage piles, and in the winter to load wood from the storage piles onto flat bed cars. The flat bed cars were then pushed over to the woodroom where another crane unloaded the wood onto a conveyor. On occasion a crane would not be available to perform this task, and the wood was unloaded from the flat bed cars by hand. Starting in the mid 1950's, cranes were also used to unload wood from trucks and place it in piles. At the time of the hearing, the company had a total of seven cranes at the mill, including a number with caterpillar tracks. Because most wood arrived in the summer by way of the water route, the cranes were always used with greater frequency in the winter as wood was moved from the wood piles to the woodrooms.

7. By law, the company's cranes could only be operated by persons holding hoisting engineer certificates. The Operating Engineers' Union is a craft union which



represents, among others, hoisting engineers. The company accordingly employed members of the Operating Engineers' Union to operate its cranes, and recognized the union as their bargaining agent. It should be noted that the Operating Engineers' Union also represents certain employees working in the company's steam plant, but these employees are not affected by these proceedings.

8. The rubber-tired equipment which is the subject matter of these proceedings, is hydraulically operated and does not require a hoisting engineers certificate to operate. The evidence indicates that the equipment requires less skill to operate than does a crane. It was the contention of certain witnesses called by the Operating Engineers' Union that because of their prior training and experience, crane operators were better qualified to operate the equipment. The evidence, however, suggests that if such an advantage does exist, it is a marginal advantage only, and that a non-crane operator with a healthy dose of common sense and concern for safety can compensate for it with, at most, a slightly longer familiarization period. The equipment in question is capable of being used for a variety of tasks. Of interest in these proceedings is the fact that a grappling hook can be attached to the equipment so that it can be used to pick up and move fairly large quantities of wood. Because of the nature of the vehicles, they are much more flexible than are cranes.

9. One of the first rubber-tired machines to be used by the company was a front end "544" loader. This 544 was acquired about 1975 to do tasks such as yard clean up and snow plowing, but not to move wood. The operation of the machine was assigned to members of the Paperworkers' Union, most likely because they had been responsible for yard work. In 1977 the company acquired a second 544 to be used in supplying wood chips, sawdust and the like to the boiler room to be used for fuel. The company originally assigned the operation of the equipment to the Operating Engineers' Union but, after a protest from the Paperworkers' Union, reassigned it to that union. The operation of all forklift trucks when they were introduced was also assigned to members of the Paperworkers' Union.

10. It appears that the first rubber-tired equipment actually used to move wood was a Pettibone "cary lift" which was used briefly on a test basis in 1974. During or about 1975 another Pettibone cary lift was rented for about three months to replace a crawler crane which had broken down. In 1978 the company acquired a hydraulic machine mounted on caterpillar tracks. At first this machine was used sparingly as a back up to an American crane, but during the winter of 1981-82 it began to be used with much greater frequency. Although the operation of these pieces of equipment was claimed by the Paperworkers' Union, the company assigned their operation to the Operating Engineers' Union.

11. What gives rise to these proceedings was the decision of the company to utilize two fairly large rubber-tired hydraulic vehicles equipped with a front end grapple, namely a John Deere Model 844 and a Clark Model 125. The 844 appears to have been acquired in November of 1981, and the 125 sometime thereafter. During the 1981-82 winter season the rubber-tired equipment played a major role in the day to day movement of wood. Indications are that they will play a much more important role during the 1982-83 winter season, and in later years. There is no question but that the equipment is being used to perform work which had previously been performed with

the use of cranes. There is also no question but that the use of the new equipment has decreased the use of the cranes. Mr. Rudy Cederwall, the company's head crane operator, testified that of the seven cranes on the mill site, four or five would likely be put up for sale within the next six months.

12. The company assigned the operation of the 844 and 125 to the Operating Engineers' Union. No company official testified at the hearing to explain why it did so. However, in his final submissions, the company's representative did note that the collective agreement between the company and the Operating Engineers' Union appears to cover the work in question while the collective agreement with Paperworkers' Union does not. He also referred to an October 10, 1981 letter to the Operating Engineers' Union from Mr. W. C. McKinnon, the company's Employee Relations Manager, which read as follows:

"This is to advise you in accordance with the labour agreement section 301(a)(v) that the company is in the process of acquiring a John Deere Model 844, with a Harricana front end grapple. This machine is expected on site November 1st or sooner.

This machine will be used to load, unload and for the ground transport of rough and peeled pulpwood at the old woodroom site, and other areas of the mill complex.

On the basis that the I.U.O.E. Local 940 has traditionally handled pulpwood movements within the mill area with grapple equipment, we are assigning the operation of this equipment while on pulpwood handling operations to your local.

We will be prepared to discuss rate assignment in line with industry standards sometime in the near future, after arrival of the equipment.

This equipment is not covered under the provisions of Letter of Understanding #6 and as a consequence, does not fall under the established rules of slotting cranes."

It should be noted that the company played a very "low-key" role in these proceedings, and at the hearing did not actively support the claims of either of the two unions.

13. As already noted, the company utilized its cranes with greater frequency during the winter season than during the summer. Under other circumstances, this might have resulted in a situation where some of the crane operators would have been laid off during the summer months, and where the company might have faced difficulties during the winter months in obtaining the services of a sufficient number of crane operators. In fact, however, these problems did not arise because of an agreement entered into between the two unions on March 1, 1975. The company was not a signatory to this agreement, but it is clear from the way that the agreement was implemented over the years that the company did honour its terms. Part of the agreement dealt with work in the steam plant, and is not relevant to these proceedings.

The other part of the agreement, which deals with the manning of cranes, reads as follows:

- “1. A quota of Twenty (20) members of Local 940, I.U.O.E. be maintained as a permanent Crane Crew at all times.
  2. In the event that additional men are required for the operation of the Crane Crew Department, then the additional men will be drawn from Local #1330 U.P.I.U. on a seniority basis with required qualifications without being required to pay dues or other assessments to Local #940.
  3. However, if the quota of Twenty (20) men is reduced by retirement or other reasons, then the Senior man of Local #1330 with the requirements, will move up to the permanent Crew, and become a member in good standing of Local #940.
  4. If a cut-back occurs to the extent that the Permanent Crews of Local #940 are reduced, then up to Fifteen (15) members of Local #940 will be allowed to work under the jurisdiction of Local #1330, plant seniority considered, without being required to pay dues or other assessments to Local #1330.”
14. The essence of this agreement is that the Operating Engineers' Union will maintain a crane crew of 20 members, but that if additional crane operators are required, they will be drawn from the ranks of the Paperworkers' Union. As a result of the agreement, every winter a number of members of the Paperworkers' Union worked on the cranes within the jurisdiction of the Operating Engineers' Union, but neither joined nor paid dues to that union. At times up to ten members of the Paperworkers' Union might be working within the jurisdiction of Operating Engineers' Union. In the summer, these paperworkers would return to work within the jurisdiction of their own union. A number of paperworkers working on the cranes obtained sufficient training and experience to acquire hoisting engineer licences, and thus became fully qualified crane operators, albeit still remaining members of the Paperworkers' Union. Whenever a member of the Operating Engineers' Union retired or for some other reason left the company's employ, then pursuant to paragraph 3 of the agreement one of the members of the Paperworkers' Union holding a hoisting engineers licence became a member of the Operating Engineers' Union. Paragraph 4 of the agreement provides that if for some reason the permanent crew of Operating Engineers is to be reduced to fewer than 20, then up to 15 members of the Operating Engineers' Union will be permitted, in accordance with their plant seniority, to work within the jurisdiction of the Paperworkers' Union without joining the union. Indications are that while members of the Operating Engineers' Union did take advantage of this provision in the past, there has been no need for any of them to do so for at least the past five years.
15. Although the company assigned the operation of the equipment in issue to the Operating Engineers' Union, because of the agreement between the unions, at times the equipment has actually been operated by members of the Paperworkers' Union. Up to the time of the hearing, only members of the Paperworkers' Union who were qualified crane operators had been assigned to operate the equipment.



16. Reference has already been made to the fact that the company views the collective agreement between the company and the Operating Engineers' Union as covering the operation of the equipment in question. Article 301(b) of this agreement provides that the Union is to have jurisdiction over the:

“(iv) operation of power hoists of any type used outside the mill buildings and hoisting equipment inside mill buildings requiring licensed hoisting personnel under the laws of Ontario in accordance with existing jurisdiction. It is further understood that changes in licensing requirements will not alter present jurisdiction but may effect classifications.”

When operating the equipment in issue, an employee is paid as a “cary-lift operator” (a classification not set out in the Operating Engineers' collective agreement) and receives a lower rate than when he operates a crane. The Paperworkers' collective agreement with the company defines the bargaining unit by reference to a number of classifications. There is no classification covering the equipment in issue. It is perhaps worth noting at this point that although the Board does consider the terms of relevant collective agreements as one factor among others when making a work assignment, once the assignment has been made then, pursuant to section 91(17) of the Act, the assignment overrides any contrary provisions in a collective agreement.

17. Evidence was put before the Board with respect to the practice of the company at its mill in Fort Frances, where there is no local of the Operating Engineers' Union. The evidence indicates that prior to 1971 the Fort Frances crane operators were represented by their own trade union, but that since 1971 they have been members of the Paperworkers' Union. The evidence further indicates that the operation of all rubber-tired equipment has been assigned to members of the Paperworkers' Union.

18. Only limited evidence was put before the Board concerning the practice of other paper companies. What evidence there is indicates that the operation of rubber-tired equipment has generally been assigned to members of either the United Paperworkers' International Union or the Canadian Paperworkers Union. We were advised that one exception to this general practice is to be found at the Ontario Paper Company's mill in Thorold where the equipment is operated by members of the Operating Engineers' Union. A partial exception is also to be found at the Great Lakes Paper Company's mill in Thunder Bay. The evidence indicates that in the 1970's the Great Lakes Paper Company began to replace its cranes, which were operated by members of the Operating Engineers' Union, with rubber-tired hydraulic equipment. At that time an agreement was entered into between the relevant locals of the Paperworkers' Union and the Operating Engineers' Union whereby members of the Operating Engineers' Union who were displaced from the cranes would operate the new equipment, but that their replacements or any additional operators, would come within the jurisdiction of the Paperworkers' Union. Today the equipment is being operated by members of both unions. However, by a process of attrition, all such equipment will eventually come to be operated only by members of the Paperworkers' Union.

19. The parties referred the Board to only one previous case involving the type of equipment in issue, namely, *Provincial Paper Limited, Port Arthur Division* [1967]



OLRB Rep. Oct. 672. In that case the employer assigned the operation of a Pettibone cary-lift (which is basically similar to the type of equipment we are dealing with) to members of a local of the Paperworkers' Union. The Operating Engineers' Union applied to the Board seeking an assignment of the work on the basis of a claim that the equipment was performing the same functions as had previously been performed by diesel crawler cranes operated by members of the Operating Engineers' Union. The historical background to that case was similar in many respects to the background here. The Board summarized its findings of fact in the *Provincial Paper* case as follows:

"On the basis of the evidence, the type of vehicle and the mode of operation of the cary-lift seems to be quite different from a diesel crawler crane. Also, the skills required to operate a cary-lift appear to be less onerous than those required to operate a diesel crawler crane. Further, the evidence reveals that with the exception of the cranes, all work performed in the mill yard of the company has always been done by members of the respondent union. (i.e. The Paperworkers' Union). Moreover, by having members of the respondent union operate the cary-lift, these employees obviously can more readily be integrated and utilized in other yard work, when the cary-lift is not in operation, since the respondent union has general jurisdiction over the mill yard. Finally, the evidence regarding the use by other companies of cary-lifts or similar machines indicates that by and large members of the respondent union or another industrial union have been operating these vehicles."

The Board then went on to direct that the work continue to be assigned to members of the Paperworkers' Union.

20. In the instant case, the evidence establishes that the skills of a hoisting engineer are not required to operate the equipment in issue. Historically, all work connected with the movement of wood belonged to the Paperworkers' Union, but technological progress led to the introduction of cranes which required the skills of hoisting engineers to operate. Business of this, the Operating Engineers' Union acquired bargaining rights as a craft for the crane operators. Technological change has occurred once again, but now on the new equipment the skills of the craft are no longer required. In this context, the historical-based claim of the Operating Engineers' Union is not a very strong one. Further, as the Board noted in the *Joseph Brant Memorial Hospital* case [1981] OLRB Rep. Nov. 1598, while the *Labour Relations Act* does accord a special status to craft bargaining units, it does not guarantee their continued preservation when the craft basis for them has been eroded or disappears.

21. The terms of the collective agreement between the Operating Engineers' Union and the company do tend to support the claim of the Operating Engineers. However, both area practice and Board jurisprudence favour the Paperworkers' Union. The 1957 agreement between the two unions allowing individuals to move between their respective bargaining units has served to largely shelter the company from the disruptions which would otherwise have occurred as its need for crane operators fluctuated with the seasons. Should one of the unions decide not to apply the agreement with respect to the new hydraulic equipment, then a number of difficulties will likely

result. In our view, such difficulties would be minimized if the equipment were to come within the jurisdiction of the Paperworkers' Union, since when employees were no longer required to operate the equipment they could fairly easily be integrated into other mill operations within the Paperworkers' Union's jurisdiction. When all of these considerations are taken into account we are satisfied, and so direct (subject to the condition set out below), that the handling, loading, ground transportation, and unloading of pulp wood by means of motorized equipment, including rubber-tired front end loaders with grapple equipment, not requiring "an operating engineers' ticket," be assigned to employees working within the jurisdiction of the United Paperworkers International Union, Local 1330.

22. Unlike most jurisdictional disputes which come before the Board, this case does not involve a dispute between two craft unions whose members continually move from employer to employer and whose primary connection is to their trade and craft union as opposed to any single employer. All of the members of the Operating Engineers' Union who will be affected by this decision have been employed by Boise Cascade at its Kenora mill for a number of years. Many, if not most of them, originally came out of the Paperworkers' Union. Further, on the basis of the 1975 agreement between the two unions it has been common for members of one union to be working within the jurisdiction of the other. Given this background, it is not our intent that members of the Operating Engineers' Union be displaced from their employment with the company as a result of this award. Accordingly, the award is made conditional on an undertaking by the Paperworkers' Union that any existing employees who currently belong to the Operating Engineers' Union will be permitted, according to their plant seniority, to work within the jurisdiction of the Paperworkers' Union while continuing to pay dues to the Operating Engineers' Union. We recognize that one likely result of this condition is that for a time a number of members of the Operating Engineers' Union will be operating the equipment in issue. However, since the condition is limited only to existing employees who currently belong to the Operating Engineers' Union, over time all such equipment will come to be operated by members of the Paperworkers' Union.

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**0461-82-R Food and Service Workers of Canada, Applicant, v. Bond Place Hotel, Respondent, v. Group of Employees, Objectors**

**Certification Where Act Contravened – Membership Evidence – Practice and Procedure – Remedies – Unfair Labour Practice – Irregularities corrected and disclosed in Form 9 – Membership evidence acceptable – Employee signing card and paying dollar thinking it was lottery – Union returning dollar and explaining nature of union membership – Subsequently signed card acceptable – Respondent admitting violations after union completed leading evidence – Admission not making evidence before Board irrelevant for purposes of s.8 – Union certified without vote – Other remedies included due to nature of violations**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. Wilson and B. L. Armstrong.

**APPEARANCES:** *M. Cornish, W. Iler and others for the applicant; M. Contini and S. Pustil for the respondent; R. Stevenson, C. Tavares and others for the objectors.*

**DECISION OF THE BOARD;** February 3, 1983

1. This is an application for certification in which the Board issued an earlier decision on August 19, 1982.
2. In its decision of August 19, 1982 the Board determined that two units of the respondent's employees were appropriate for collective bargaining namely a "full-time" and a "part-time" unit. The final composition of the units remained in doubt at the time of the earlier decision due to a claim on the part of the applicant that two union members, namely Mr. Scott Dowdell and Miss N. Howes, had been unlawfully discharged by the respondent prior to the application date. The respondent has now acknowledged that it did in fact discharge both of these individuals contrary to the provisions of the *Labour Relations Act*. Having regard to the terms of section 1(2) of the Act, both of these individuals are to be considered as having been bargaining unit employees on the date of the filing of the application. This being the case, and having regard to all of the material before us, we are satisfied that as of the application date there were 77 employees in the "full-time" bargaining unit, of whom 43 were union members on the terminal date, the date already set as the time for ascertaining membership under section 7(1) of the Act. We are further satisfied that there were 26 employees in the part-time bargaining unit of whom 12 were union members.
3. Having regard to the numbers involved, it is apparent that for the applicant to be certified with respect to the part-time bargaining unit in accordance with the general certification procedures set forth in the Act, it would have to receive the support of a majority of bargaining unit employees casting ballots in a representation vote. The applicant, however, has requested that it be certified for the unit without a vote in accordance with the extraordinary certification provisions set forth in section 8 of the Act. With respect to the full-time bargaining unit, the applicant has filed membership evidence on behalf of more than the fifty-five per cent of the employees, and accordingly meets the minimum requirements under the Act for automatic certification. The applicant has requested that if for some reason it is not otherwise entitled to



automatic certification with respect to the full-time unit, that the Board certify it pursuant to the provisions of section 8.

4. There were filed with the Board a number of statements in opposition to the application signed by a total of 43 employees, of whom seven were full-time employees who had earlier signed union cards. An additional two part-time employees who had earlier signed union cards also signed a statement. In instances where the Board is satisfied that sufficient numbers of union members have voluntarily signed statements indicating a "change of heart" with respect to trade union representation, the Board will generally exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote notwithstanding that the union might otherwise be entitled to automatic certification. Given the applicant's membership position with respect to the full-time bargaining unit, it appeared during the course of these proceedings that the statements might well affect the applicant's right to automatic certification with respect to that unit. Before the Board will direct the taking of a representation vote on the basis of such statements, however, it seeks assurances that management has not played any role with respect to their origination or circulation, and further that the relevant circumstances would not cause reasonable employees to be concerned that management has played a role with respect to the documents, or that management is likely to become aware of which employees refused to sign them. In such circumstances, the Board is unlikely to consider the statements to be voluntary and will give them no weight.

5. Although evidence was led before the Board with respect to certain of the statements in opposition to the application, there were great gaps in the evidence relating to how some of them came into being, and as to the circumstances under which other statements were circulated. With respect to certain of the statements, no evidence at all was put before the Board. The evidence with respect to two statements which were *not* filed with the Board, establishes to our satisfaction that a managerial person played a role in the origination of one of them and that a different managerial person played a role in the circulation of the other. Given all of these circumstances, the Board ruled orally that with one exception, it was not satisfied that the statements reflected the voluntary wishes of the employees who signed them. The one exception related to Mr. Robert Stevenson, an employee in the full-time bargaining unit, who testified before the Board. On the basis of Mr. Stevenson's testimony, the Board was satisfied that for reasons of his own he had changed his mind about being represented by the applicant, and had written out and signed one of the statements. Although there were gaps in the evidence concerning what had subsequently happened to the document before it was filed with the Board, the evidence indicates that Mr. Stevenson gave it to another employee with the reasonable belief it would be mailed to the Board without management's knowledge. Accepting that Mr. Stevenson voluntarily signed a statement leaves slightly less than fifty-five per cent of the employees in the full time unit who were union supporters.

6. The respondent has challenged the acceptability of all of the applicant's membership evidence, primarily on the basis of two separate incidents. The first incident involved two employees who signed union membership cards at the request of another employee, Elizabeth Rodrigues, and who each paid a dollar to Miss Rodrigues. The two were among the first employees to sign for the union. The main employee



contact for the union at the respondent's hotel was Miss Noreen Howes. Miss Howes approached a large number of employees to get them to sign union cards, and she acted as the collector of a dollar with respect to their cards. Miss Howes also received cards and money from other employee collectors for forwarding to the union. When Miss Rodrigues gave the two cards in question along with one dollar for each card to Miss Howes, she advised Miss Howes that she was afraid that if she were to sign the two cards as collector, and management were to become aware of that fact, she might find herself "in trouble". In the result, Miss Howes signed the two cards as the collector. Miss Howes later turned the cards over to Miss Wendy Iler, a full-time representative of the applicant trade union who was responsible for co-ordinating the organizing campaign among the respondent's employees. Miss Iler questioned Miss Howes about these and other cards, and in particular asked who had been the actual collector. When Miss Howes explained what had transpired with respect to the two cards in question, Miss Iler advised her that it was the actual collector who had to sign the cards. Miss Howes then took the two cards back to Miss Rodrigues who put her initial next to Miss Howes' signature. When the cards were again reviewed by Miss Iler, she advised Miss Howes that they were still not acceptable. Miss Howes again returned to see Miss Rodrigues. This time a line was placed through Miss Howes' signature, and Miss Rodrigues signed as the collector on both cards. A summary of these events was set forth on the Form 9 "Declaration Concerning Membership Documents" which was executed by Miss Iler and filed with the Board in support of the applicant's membership evidence.

7. The Form 9 is an important part of a union's filings in any certification application. Indeed, if a union fails to file a Form 9 (or Form 80 in the construction industry) the Board will not give any weight to the union's membership evidence. See, *Pietrangelo Masonry* [1981] OLRB Rep. Feb. 218. The importance of a Form 9 flows from the fact that membership evidence is but a form of written hearsay. Further, in the interests of protecting the identity of union supporters, the employer is not shown the cards and is not permitted to examine employees on the stand with respect to whether or not they signed a union card, and if so, whether the card correctly records what transpired. In consequence of these considerations, the Board requires that a responsible union official conduct an inquiry into whether the union's cards were actually signed by the employees whose names appear on them, and whether the individuals signing as collectors in fact collected at least one dollar from each employee. Once this inquiry is complete, the union official is to make a declaration on Form 9 which states as follows:

"On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgements of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgement of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose names appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES: ..."

If it subsequently turns out that no inquiry was made prior to the signing of the Form 9, or that the person signing the Form 9 was aware of some discrepancy in the union's

cards but did not indicate it on the space provided, the Board may dismiss the application entirely on the basis that no weight can be given to the declaration on the Form 9. See, for example, *Kitchener News Company Limited* [1980] OLRB Rep. Nov. 1656. However, where an irregularity on a card is noted on the Form 9, the Board's general practice is to concern itself with the acceptability of the card in question, without also placing in doubt the acceptability of all of the other cards.

8. In the instant case, we are satisfied that Miss Iler took care to make the inquiry called for in the Form 9, and that this inquiry brought to light the irregularities with respect to the two cards in question. Miss Iler then took steps to have the irregularities corrected, and in addition noted the matter on the Form 9. In our view, the corrected cards constitute acceptable evidence of membership and in light of the manner in which Miss Iler dealt with the matter, we do not have cause to be concerned about the propriety of the remaining cards.

9. The second main incident being relied upon by the respondent in its challenge to the acceptability of the applicant's membership evidence relates to the circumstances surrounding the signing of a union card by an employee, Mr. Jose Vieira. Mr. Vieira's native language is Portuguese and he has almost no comprehension of the English language. Mr. Vieira cannot read either English or Portuguese. On May 24, 1982 Miss Howes, who was not very familiar with Mr. Vieira, approached him about the union. Miss Howes, in English, sought to discuss the union with Mr. Vieira and to obtain from him his name and telephone number so that he could later be contacted at home by a Portuguese speaking canvasser. While so engaged, Miss Howes held in her hands a union card and three leaflets in the Portuguese language. Mr. Vieira listened to Miss Howe's comments in English and at one point nodded his head. He then looked over the Portuguese language leaflets. Following this, Mr. Vieira pulled out his wallet, and then pointed to both the union card which Miss Howes was holding and to his wallet. Miss Howes, unaware that Mr. Vieira had understood absolutely nothing of what she had said, and that he could not read Portuguese, concluded that he had understood her message and decided to sign a union card. Miss Howes then stated that Mr. Vieira would have to pay one dollar. Mr. Vieira, who understood the meaning of "one dollar" took a dollar out of his wallet, handed it to Miss Howes and then signed his name where Miss Howes indicated on the union card.

10. Although Miss Howes reasonably believed that Mr. Vieira had decided to join the union, in fact Mr. Vieira had misunderstood completely what was going on. He had absolutely no comprehension of what Miss Howes was saying to him or what was contained in the Portuguese language leaflets. Mr. Vieira did not, however, try to indicate this fact to Miss Howes. This may have been in part because he was reluctant to reveal that he understood no English, and could not read, even in Portuguese. Also, Mr. Vieira felt that he did understand what Miss Howes was talking about. Through an interpreter Mr. Vieira testified that he had assumed that the card Miss Howes was holding was for some type of lottery or sweepstakes, and that he had decided that he would like to participate in it. Accordingly, he pulled out his wallet, and when Miss Howes mentioned "one dollar", he took out that amount, paid it to her, and then signed the card.

11. The following day Mr. Vieira showed his "lottery ticket" to one of the respondent's staff who reads and speaks both English and Portuguese. At this point Mr.

Vieira was advised that he had in fact signed a union card. The information about Mr. Vieira signing for the union on the understanding that he was purchasing a lottery ticket soon got back to Miss Howes. Miss Howes in turn explained what had happened to Miss Iler, the union representative. Miss Iler directed that Mr. Vieira's dollar be returned to him, and that a Portuguese speaking person again approach him about joining the union. Miss Iler kept in her possession the original card signed by Mr. Vieira.

12. On May 30, 1982 Mr. Vieira was approached by Miss Elizabeth Rodrigues, who speaks fluent Portuguese. Miss Rodrigues gave Mr. Vieira back his dollar and in Portuguese explained to him that it was the dollar which he had earlier given to Miss Howes. Miss Rodrigues then talked about the union with Mr. Vieira, and he indicated that he wanted to become a member. At that point, Mr. Vieira paid Miss Rodrigues a dollar, and signed a new card which Miss Rodrigues then signed as the collector. Mr. Vieira in his testimony stated that he signed this second card in order to join the union. This card was filed with the Board in support of the certification application. At the hearing, when the matter of Mr. Vieira's card was raised, the union also produced the earlier card signed by Mr. Vieira which Miss Howes had signed as the collector. The incident with respect to Mr. Vieira's card was not referred to on the Form 9. Miss Iler testified that she had not made any reference to Mr. Vieira's card on the Form 9 because the card which the union was relying on clearly met all of the conditions referred to on the printed part of the Form 9. It should be noted that the evidence indicates that no employee other than Mr. Vieira received a dollar back from the applicant.

13. Having regard to the circumstances before us, we are prepared to accept the card signed by Mr. Vieira following his discussion with Miss Rodrigues as valid evidence of membership in the applicant trade union. Further, there is nothing in the evidence concerning this episode which causes us to doubt the reliability of the remaining membership evidence filed by the union. We accept Miss Iler's testimony that she did not refer to the matter of Mr. Vieira's card on the Form 9 because the card filed with the Board was in accord with the requirements set out on the printed part of the form, as indeed it was.

14. As indicated above, the applicant is seeking to be certified pursuant to section 8 of the Act. Section 8 provides as follows:

"Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

15. In support of its request to be certified pursuant to section 8, the applicant relied on certain allegations also set forth in a series of complaints under section 89 of



the Act. Pursuant to the procedure adopted by the Board to deal with both the section 89 complaints and the section 8 application at the same time, the applicant union went first in putting in its evidence. The respondent then commenced putting in its evidence. Part way through the respondent's case, counsel for the respondent indicated that the respondent was now prepared to concede that most of the applicant's allegations were in fact well founded. In particular, counsel acknowledged that in terminating three employees, namely: Miss Howes, Mr. Dowdell, and Miss Collette Granger, the respondent had acted on the basis of an anti-union motivation. Counsel for the respondent did not concede that the respondent had closed its laundry and contracted out its laundry operations due to an anti-union motivation as claimed by the applicant, but counsel did acknowledge that the decision to select Elizabeth Rodrigues as one of the employees to be laid off as a result of the closing had been motivated by her involvement with the union. The respondent's counsel took the position that another employee laid off as a result of the contracting-out of the laundry operations, namely, Miss Natalia Rego, had been properly laid off, but that when another employee who had been retained was forced to leave the hotel due to health problems, the respondent's failure to recall Miss Rego had been motivated in part by her support for the union.

16. In admitting that the respondent acted contrary to the provisions of the *Labour Relations Act*, counsel for the respondent stated that he would not agree that the evidence before the Board reflected what in fact had occurred. Counsel also stated that Mr. Kaufman, one of the respondent's owners, expressly denied that he had engaged in any wrongdoing. In determining whether or not violations of the Act should result in the certification of a trade union under section 8 of the Act, relevant considerations are the circumstances surrounding the violations, and their likely impact upon bargaining unit employees. In our view, while the respondent was free to concede that it had violated the Act, it was not open for it to simply say the evidence before the Board does not reflect the circumstances surrounding those violations. The respondent's concession of wrongdoing does not wipe out the evidence already put before the Board or deprive the applicant of the right to refer and rely on it. If the respondent was of the view that the evidence before the Board did not accurately reflect the nature of its wrongdoings, it was free to continue to put in evidence to establish that such was the case. This being so, we are led to conclude that the evidence before us does in fact reflect what actually occurred. In addition, we can give no weight to respondent counsel's statement that Mr. Kaufman denied having engaged in any wrongdoing. The evidence before us indicates that Mr. Kaufman did, in fact, engage in serious breaches of the *Labour Relations Act* and that he directed at least one other managerial person to do likewise. Mr. Kaufman did not come forward to under oath deny this evidence. Accordingly, we must conclude that he was involved in violations of the Act.

17. Before briefly reviewing the evidence relating to the respondent's wrongdoings, we would note that the evidence does not support certain of the applicant's allegations of wrongdoing against who managerial persons. In this regard, , we are satisfied that although the respondent did unlawfully law off Miss Rodrigues, the evidence does not support the union's contention that Mrs. Machado, the hotel's executive housekeeper, had sought to harass Miss Rodrigues by assigning her more difficult work. Rather, the evidence establishes that Mrs. Machado found herself with a number of staffing problems, and in order to cope with those problems she in good faith made certain staff adjustments, including adjustments to the "mix" of Miss



Rodrigues' duties. We also do not accept the union's allegation that Mrs. Machado and Mr. Pustil, who was described as a part-owner of the Hotel, met with supervisory staff in a hotel room for the purpose of plotting actions against union supporters. The weight of the evidence suggests that while such a meeting was in fact held, the meeting dealt only with routine administrative matters.

18. As already indicated, the union's primary organizer at the respondent's hotel was Miss Noreen Howes. Miss Howes commenced working at the hotel in January of 1982 as a cashier/hostess, but was let go a few days later because the respondent was cutting down on the number of cashiers. Miss Howes was re-hired as a coffee shop waitress on February 10, 1982. By and large, Miss Howes proved to be a good waitress, and was generally assigned to one of the busier sections of the coffee shop. In March her work performance did slip for a time because of personal problems, but this situation was explained to management and she was kept on. Miss Howes' work performance was again back to normal by April, and indeed, on or about April 21st she was advised by Monica Testolin, the coffee shop supervisor, that she was doing a good job. Miss Howes began organizing for the applicant trade union on or about April 5, 1982. Miss Howes personally approached about 50 employees, either at work or at their homes, in an attempt to get them to sign union cards. It did not take long before Miss Howes' activities became common knowledge at the Hotel. Miss Howes did not act alone, but rather she recruited a number of other employees to assist her. Among those recruited were Elizabeth Rodrigues, a competent full-time employee in the housekeeping department, and Mr. Scott Dowdell, a full-time cook.

19. The evidence indicates that Mr. Dowdell was not a model employee. He both lacked experience as a cook, and tended to work very slowly. In the result, at times he failed to properly perform certain of his duties, and when things got busy other staff felt he was not "pulling his weight." Mr. Scott was discharged by the respondent on May 25, 1982, allegedly for being too slow, and showing a lack of motivation and experience. The respondent now concedes that Mr. Dowdell was discharged, in part, because of his activity on behalf of the applicant trade union.

20. On May 29, 1982 Miss Monica Testolin, the supervisor in the coffee shop, closely watched Miss Howes as she went about her duties. On a number of occasions Miss Testolin told Miss Howes that she had done things improperly. At about twelve noon, Mr. N. Karim, the Hotel's general manager, came into the coffee shop and had a brief discussion with Miss Testolin. About five minutes later, Miss Testolin advised Miss Howes that she was being terminated due to poor job performance. As already noted, the respondent now concedes that it discharged Miss Howes because of her support for the applicant trade union.

21. Because of his poor work record and his secondary role with the union, it is not at all clear that employees would have linked Mr. Dowdell's discharge to his union activity. The same, however, cannot be said with respect to Miss Howes' termination. In that Miss Howes was generally known to be the chief union organizer, and because she was basically a good worker, it would have been reasonable for employees to link her discharge to her union activity. The evidence indicates that this is precisely what happened, and that much discussion occurred among the employees concerning who the respondent had discharged Miss Howes as a result of her union activity.

22. On June 1, 1982, three days after Miss Howes had been discharged, Mr. Kaufman, one of the owners of the Hotel, was overheard telling Mrs. Machado, the Hotel's executive housekeeper, that they had gotten rid of the girl in the coffee shop (i.e. Miss Howes). Mr. Kaufman also directed Mr. Machado to find out who had signed for the union and to fire them one by one. To her credit, Mrs. Machado did not do so, although she was later involved in laying off two union supporters when expressly directed to do so by Mr. Kaufman. At about the same time, Mr. Kaufman gave directions that the housekeeping staff be denied certain existing privileges such as the receipt of free soup and toast on their breaks. These privileges, however, were reinstated shortly thereafter.

23. As already noted, Miss Howes was discharged on May 29, 1982. On June 5, 1982 Miss Collette Granger applied for a weekend waitressing position with the respondent, and was hired as Miss Howes' replacement. Miss Granger was in fact a part-time employee of the applicant trade union, and part of the reason for her seeking employment at the Bond Place was to "keep an eye" on developments. Miss Granger was a highly experienced and capable waitress. Indeed, the day after she was hired the supervisor in the coffee shop was overheard telling Mr. Karim, the general manager, that "the new waitress is super". Somehow, or other, the respondent came to learn of Miss Granger's connection with the applicant trade union, and on July 28, 1982 she was discharged, allegedly for poor work performance. The respondent now acknowledges that Miss Granger was discharged because of her connection with the applicant trade union.

24. The hearing into these proceedings commenced on or about June 25th, 1982. Miss Elizabeth Rodrigues attended at some of the hearings with representatives of the union. Although Miss Rodrigues had earlier done some campaigning on behalf of the applicant, the evidence establishes that the respondent first became aware of her support for the union when she attended at the hearings. On or about October 12, 1982, the respondent closed its laundry and sub-contracted out its laundry operations. As noted above, the respondent acknowledges that the Miss Rodrigues was selected as one of those to be laid off following the closing because of her support for the union. The respondent contends that at about the same time it properly laid off another union supporter, Miss Natalia Rego, but concedes that except for her support for the union she would shortly thereafter have been called back to work. Miss Rego was in attendance at a Ontario Labour Relations Board hearing with representatives of the union in August of 1982.

25. As the Board noted in the *Ex-Cell-O Wildex, Canada* case [1977] OLRB Rep. June 370, certification pursuant to the provisions of section 8 of the Act was designed as both a deterrent to illegal employer interference in union organizational campaigns, as well as a device to provide a meaningful and effective remedy in those cases where an employer's interference has operated to destroy the free selection process guaranteed by section 3 of the Act. As the wording of the section makes clear, certification under section 8 in circumstances such as those before us can only be granted if three conditions are satisfied, namely:

- (i) The Act has been violated.

(ii) The true wishes of employees are not likely to be ascertained in a representation vote.

(iii) In the opinion of the Board, the applicant has membership support adequate for the purposes of collective bargaining.

26. The respondent acknowledges that it has breached the Act. Those breaches, involving as they did the discharge and lay-off of union supporters, would likely be viewed by other employees as a clear demonstration that any exercise of their own rights to join and participate in the lawful activities of the applicant trade union might also attract retaliation by the respondent. The resulting effect on employees is likely to be heightened by the fact that the respondent's unlawful activities spanned some five months in all, and continued even after the legality of its earlier conduct had been raised as an issue before the Board. Given these circumstances, we are of the view that the free wishes of employees were not now likely to be ascertained by way of a representation vote.

27. The applicant filed membership evidence with respect to more than 55 per cent of the employees in the bargaining unit, although its support falls below 55 per cent when the single voluntary signature on a statement in opposition to the application is taken into account. With respect to the part-time unit, the applicant filed membership evidence with respect to slightly over forty-five per cent of the employees. In our view, the fact that the applicant has membership support in excess of fifty per cent in the full-time bargaining unit, gives it a stronger presence in the work place generally, such that employees in the part-time unit are likely to gain support from the full-time employees. See, *Robin Hood Multi-Foods Inc.* [1981] OLRB Rep. July 972. In all of these circumstances, the Board is of the opinion that the applicant has sufficient support in both bargaining units so as to enable it to engage in collective bargaining with the respondent. Accordingly, we view it as appropriate that the applicant be certified to represent the employees in both bargaining units pursuant to the provisions of section 8 of the Act.

28. The respondent is of the view that the Board erred during the course of the proceedings when it concluded that Mr. F. White should be considered as having been an employee in the full-time unit on the application date. So that there is no uncertainty in the matter, even if we were to accept as correct the respondent's position with respect to Mr. White, the Board would still be prepared to certify the applicant with respect to the full-time unit pursuant to the provisions of section 8 of the Act.

29. Certificates will now issue to the applicant with respect to the following two units of employees:

*"FULL-TIME" UNIT:*

All employees of the respondent in the Municipality of Metropolitan Toronto employed at the Bond Place Hotel, save and except supervisors, persons above the rank of supervisor, office staff, front desk staff, switchboard operators, security personnel, persons regu-



larly employed for not more than twenty-four hours per week, and students employed during vacation period.

*“PART-TIME” UNIT:*

All employees of the Respondent at the Bond Place Hotel in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, office staff, front desk staff, switchboard operators and security personnel.

30. Because of the nature of the respondent’s breaches of the Act, it is our view the issuance of certificates to the applicant will not be sufficient to place it in the same position that it would have been in if the respondent had not contravened the Act. Accordingly, we believe it appropriate for the Board to exercise its remedial jurisdiction under section 89 of the Act (the section 89 complaints having been heard at the same time as the section 8 matter) and seek to establish conditions that will enhance the legitimacy of both the applicant trade union and the collective bargaining process in the eyes of employees, as well as promote employee participation in the bargaining process. The Board therefore orders that the respondent:

(1) cease and desist from interfering with the selection of a trade union by its employees and discriminating against employees because of their support for a trade union;

(2) provide the applicant forthwith with a list of names and addresses of employees in each of the bargaining units, and keep the list updated on a monthly basis for one year or until the union has entered into a collective agreement (or collective agreements) with the respondent with respect of the bargaining units, whichever shall first occur;

(3) permit the applicant access to its hotel during working hours for the purpose of convening meetings to address employees in each of the bargaining units out of the presence of any member of management; the meetings shall be scheduled by the applicant so that each employee in each bargaining unit has an opportunity of attending one of them during his or her normal working hours; each meeting shall not exceed one and a half hours in length;

(4) provide the applicant for a period of one year from the date hereof, with reasonable access to any and all employee notice boards in its hotel for the posting of union notices, bulletins and other union business literature;

(5) post copies in the English, Italian and Portuguese languages of the attached notice marked “Appendix”, after being duly signed



by a management official, in conspicuous places in its hotel where they are likely to come to the attention of employees, and keep the notices posted for sixty consecutive working days; reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced, or covered by any other material; reasonable physical access to the premises shall be given by the respondent to a representative of the applicant so that the applicant can satisfy itself that this posting requirement is being complied with.

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## Appendix

## The Labour Relations Act

**NOTICE TO EMPLOYEES****Posted by Order of the Ontario Labour Relations Board**

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS ARISING OUT OF THE EFFORTS OF FOOD AND SERVICE WORKERS OF CANADA TO BECOME THE BARGAINING AGENT OF OUR EMPLOYEES. DURING THE HEARINGS WE ACKNOWLEDGED THAT WE VIOLATED THE LABOUR RELATIONS ACT BY INTERFERING WITH THE RIGHTS OF OUR EMPLOYEES TO SELECT A BARGAINING AGENT OF THEIR CHOICE, IN PARTICULAR BY DISCHARGING AND OTHERWISE DISCRIMINATING AGAINST CERTAIN UNION SUPPORTERS. THE ONTARIO LABOUR RELATIONS BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY OR ALL OF THESE THINGS, IF THEY WISH;

WE ASSURE ALL OF OUR EMPLOYEES THAT:

- WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS;
- WE WILL NOT DISCHARGE OR DISCRIMINATE AGAINST EMPLOYEES BECAUSE OF THEIR SUPPORT FOR THE UNION;
- WE WILL NOT INTERFERE WITH OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT;
- WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD;
- WE WILL REINSTATE AND/OR COMPENSATE THOSE EMPLOYEES THAT WE DISCHARGED OR OTHERWISE DISCRIMINATED AGAINST BECAUSE OF THEIR SUPPORT FOR THE UNION IN ACCORDANCE WITH AGREEMENTS REACHED BETWEEN US AND THE TRADE UNION OR, FAILING SUCH AGREEMENTS, IN ACCORDANCE WITH TERMS SET BY THE ONTARIO LABOUR RELATIONS BOARD;

WE WILL PROVIDE THE UNION FORTHWITH WITH A LIST OF THE NAMES AND ADDRESSES OF BARGAINING UNIT EMPLOYEES, AND KEEP THE LIST UPDATED ON A MONTHLY BASIS FOR ONE YEAR OR UNTIL WE AND THE UNION HAVE ENTERED INTO A COLLECTIVE AGREEMENT (OR COLLECTIVE AGREEMENTS);

WE WILL PERMIT THE UNION ACCESS TO THE HOTEL DURING WORKING HOURS FOR THE PURPOSE OF CONVENING MEETINGS TO ADDRESS BARGAINING UNIT EMPLOYEES OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT. THE MEETINGS SHALL BE SCHEDULED BY THE UNION SO THAT EACH BARGAINING UNIT EMPLOYEE HAS A REASONABLE OPPORTUNITY OF ATTENDING ONE OF THEM DURING HIS OR HER WORKING HOURS. EACH MEETING SHALL NOT EXCEED ONE AND A HALF HOURS IN LENGTH;

WE WILL PROVIDE THE UNION A PERIOD OF ONE YEAR FROM THE DATE HEREOF, WITH REASONABLE ACCESS TO ANY AND ALL EMPLOYEE NOTICE BOARDS IN THE HOTEL FOR THE POSTING OF UNION NOTICES, BULLETINS AND OTHER UNION BUSINESS LITERATURE;

WE WILL, UPON BEING GIVEN WRITTEN NOTICE TO BARGAIN, BARGAIN IN GOOD FAITH WITH THE UNION AS THE DULY CERTIFIED COLLECTIVE BARGAINING REPRESENTATIVE OF OUR EMPLOYEES IN BOTH A "FULL-TIME" AND A "PART-TIME" BARGAINING UNIT, AND WE WILL MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT (OR COLLECTIVE AGREEMENTS).

BOND PLACE HOTEL

PER: \_\_\_\_\_  
AUTHORIZED REPRESENTATIVE

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

DATED this 3 day of FEBRUARY, 1983.

**1467-82-R** The Energy and Chemical Workers Union CLC, Applicant, v. **Canada Cement Lafarge Limited**, Respondent, v. United Cement, Lime, Gypsum and Allied Workers International Union AFL-CIO-CLC, Intervener

**Bargaining Unit - Certification - Practice and Procedure - Board Policy in displacement situations to retain same unit configurations as that of incumbent union - Whether incumbent union held bargaining rights in single or two separate units**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members F. W. Murray and C. A. Ballentine.

**APPEARANCES:** *M. Levinson, Donald G. Burshaw, Eric Batten and Douglas Chisholm for the applicant; F. G. Hamilton and Geo. Petta for the respondent; no one appearing for the intervener.*

**DECISION OF THE BOARD;** February 8, 1983

1. This is an application for certification in which the applicant is seeking to displace the intervener as the bargaining agent for certain employees of the respondent.

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3. In a decision dated November 22, 1982 a differently constituted panel of the Board directed the taking of a pre-hearing representation vote in which employees were asked to make a choice between the two unions. In the same decision, the Board also dealt with the description of the voting constituency. The applicant had applied for a bargaining unit consisting of certain employees at the respondent's plant in Bath, Ontario, as well as at its warehouse in Metropolitan Toronto. The respondent, however, contended that there should be separate bargaining units, one for each location. In its decision of November 22, 1982, the Board noted that on a displacement application, it generally accepts as the voting constituency the bargaining unit represented by the incumbent union. The Board added, however, that on the basis of the documentation then before it, it was unclear as to whether the incumbent held bargaining rights with respect to a single unit covering both locations, or separate units at each location. In the result, the Board directed that each of the locations be treated as a separate voting constituency, but without prejudice to the applicant's right to later argue that employees at both locations should be included within a single bargaining unit.

4. The pre-hearing representation vote with respect to the Toronto voting constituency was conducted on November 30, 1982 and the vote with respect to the Bath voting constituency on December 1, 1982. The reports of the Returning Officer who conducted both votes indicate that a majority of the employees in both voting constituencies who cast ballots marked their ballots in favour of the applicant. There has been no challenge to either the accuracy of the reports of the Returning Officer, or the manner in which the votes were conducted. Accordingly, the applicant appears to be in a certifiable position with respect to the employees at both locations, whether they be included within one bargaining unit or two.

5. At the hearing the respondent argued that in determining the appropriate bargaining unit, the Board should consider the same factors as it does when determining the unit in a “fresh” situation where the employees are not represented by any trade union. As the respondent’s counsel noted, in such situations the Board has seldom placed employees in widely separated locations within the same bargaining unit. In our view, however, the factors which lead to such a result should be given much less weight in a displacement situation. One of the factors considered by the Board in an initial certification proceeding is the risk that too wide a bargaining unit might impede the organization of a group of employees who desire union representation. This type of concern does not ever arise in the instant case. Further, the Board takes the view that where a company and union have established the viability of a multi-location bargaining unit through actual collective bargaining, and where the history of such bargaining has been relatively satisfactory, the Board ought not to encourage fragmentation. Indeed, in displacement situations the Board’s general approach is to retain the same bargaining unit configuration that has been agreed to by the employer and the incumbent trade union. This approach was discussed as follows in the *Milltronics Limited* case [1980] OLRB Rep. Jan. 56:

“On an application for certification the Board is required to determine the unit of employees which is appropriate for collective bargaining. Where one trade union is seeking to displace another, however, the established bargaining structure is *prima facie* appropriate – particularly if it has been established by the parties themselves through collective bargaining, and continued through the years over several collective agreements. Indeed, what better evidence of “appropriateness” could there be than a pre-existing bargaining structure which the parties have developed themselves and have adapted to their own bargaining circumstances. The Board has been reluctant to fragment an established bargaining structure or to “carve out” groups of employees from such a structure. The Board will generally find the appropriate bargaining unit to be that which the incumbent presently represents; although, of course, in appropriate circumstances, a larger unit may also be appropriate and could be granted without raising any concern about fragmentation. Usually, however, a “raiding union” must “take” what the incumbent union has.”

6. The most recent relevant collective agreement between the respondent and the intervener covered employees at both Bath and Toronto. The applicant contends that this indicates that the employees at both locations were included within a single bargaining unit. The respondent, however, submits that although covered by a single collective agreement, the employees at the two locations were continually regarded as coming within separate bargaining units.

7. The intervener acquired bargaining rights for the employees at the Toronto warehouse in September of 1957 by way of a certificate from this Board. On a date we were not advised of, the intervener was certified as the bargaining agent for a unit of the respondent’s employees at a plant at Point Anne, Ontario. The Point Anne operation was later phased out and replaced by the plant at Bath. At that time, the respondent



accorded voluntary recognition to the intervener with respect to its employees at Bath. The intervener also holds bargaining rights for a unit of the respondent's employees at Woodstock, Ontario and for a number of bargaining units in other provinces. Although the bargaining rights for the respondent's Ontario employees appear to have been held by the intervener International Union, in fact bargaining was done in conjunction with a union local at each location. The local at Bath was Local 219, while Local 377 was the local at Toronto. Prior to 1977, the Toronto and Bath locations were covered by separate collective agreements.

8. The Toronto warehouse is a fairly small facility, employing only some nine bargaining unit employees. In 1977, the Toronto local, Local 377 found itself in some difficulty because of an unwillingness on the part of its members to assume any leadership positions. In the result, the intervener decided to transfer the jurisdiction of Local 377 to Local 219, and to have Local Local 219 bargain on behalf of the employees at both Toronto and Bath. The respondent agreed to recognize this transfer of jurisdiction and to henceforth treat Local 219 as the successor to Local 377. In doing so, however, the respondent sought to ensure that employees at the Toronto warehouse would remain within a separate bargaining unit. This point was reflected in the following letter from Mr. W. H. Cameron, the respondent's manager of employee relations, to Mr. D. G. Burshaw, the intervener's international vice-president, on May 19, 1977:

"This will serve to confirm that the Company agrees to recognize voluntarily a transfer of jurisdiction of the Toronto Warehouse unit from Local 377 to Local 219 pursuant to Section 54 of the Labour Relations Act.

It is understood that Local 219 will be declared as the successor to Local 377 but that the Toronto Warehouse bargaining unit will remain a separate unit within Local 219.

It is further understood that the Toronto Warehouse bargaining unit will remain separate and distinct from all other plants and operations of the Company. It is understood as well that the Toronto Warehouse will retain their seniority rights which will continue to be separate and distinct from the seniority at other plants of the Company and in particular Bath."

It is to be noted that the respondent never expressly agreed to alter its position as expressed in the above letter.

9. In 1977 "national bargaining" took place between the respondent and intervener, covering a number of bargaining units, including those at Bath and Toronto. The result of this bargaining was a single multi-location, multi-local collective agreement. The heading, recognition clause, and signing portion of this agreement read as follows:

"THIS AGREEMENT ENTERED INTO this 1st day of July, 1977

CANADA CEMENT LAFARGE LTD., a body corporate, having its head office in the City of Montreal, herein after called the 'Company'

PARTY OF THE FIRST PART;

AND

UNITED CEMENT, LIME & GYPSUM WORKERS INTERNATIONAL UNION, A.F.L.-C.I.O.-C.L.C., in behalf of its Local Unions

219, Bath, Ontario  
 274, Winnipeg, Manitoba  
 324, Havelock, New Brunswick  
 368, Woodstock, Ontario  
 219, Toronto Warehouse Unit  
 384, Hull, Quebec  
 453, Floral, Saskatchewan  
 454, Brookfield, Nova Scotia

hereinafter called the 'Union'

PARTY OF THE SECOND PART

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## ARTICLE II

### RECOGNITION

The Company recognizes the Union as the sole collective bargaining agency for all employees *at its plants at Bath, Ontario; Winnipeg, Manitoba; Havelock, New Brunswick; Woodstock, Ontario; Toronto Warehouse, Ontario; Hull, Quebec; Floral, Saskatchewan; and Brookfield, Nova Scotia.*

• • •

SIGNED ON BEHALF OF THE PARTIES HERETO BY THEIR DULY AUTHORIZED REPRESENTATIVES:

CANADA CEMENT  
 LAFARGE LTD.

UNITED CEMENT, LIME &  
 GYPSUM WORKERS  
 INTERNATIONAL UNION,  
 A.F.L.-C.I.O.-C.L.C.

John D. Redfern, President  
Pierre Messier, Secretary

Witnesses:  
W.H.J. Cameron  
R. A. Corbett

Witness:  
A.L. Gaunce

Witness:  
R.W. Larkworthy

Witness:  
R.W. Suderman

Witness:  
Pierre de la Rochelle

Witness:  
A.V. Rawle

Witness:  
S.H. Galpin

Witness:  
H.N. Burrows,

Witness:  
Donald L. King

Donald G. Burshaw, Seventh  
International Vice-President  
Eric Batten and Roy Ogilvie  
District Representatives

Witness:  
*Local 219* – Robert B. Ostofi

Witnesses:  
*Local 274* – W. Didora  
N. Mudry

Witnesses:  
*Local 324* – David C. Mills  
Harold L. Kierstead

Witnesses:  
*Local 368* – Don Pattinson  
Lorne King

Witness:  
*Local 219, Toronto Warehouse*  
*Unit B.* Vicich

Witness:  
*Local 384* – A. Parizeau

Witnesses:  
*Local 453* – Bernard Schewage  
Glenn Cox

Witnesses:  
*Local 454* – Roy C. Baird  
A. Belliveau”

(emphasis added)

Given the nature of the joint negotiations, the involvement of a number of locals in various provinces, and the history of bargaining subsequent to the expiry of the agreement, we are satisfied that this collective agreement was meant to apply to eight separate bargaining units, and not to a single multi-plant multi-province unit. It is to be noted that the plant at Bath and the Toronto Warehouse were separately referred to in both the heading and recognition clause, and that the document was signed by witnesses from both *Local 219* and *Local 219 “Toronto Warehouse Unit”*. These factors indicate to us that Bath and Toronto were considered as separate bargaining units, on a par with the units at other locations, notwithstanding the fact that the employees in both units belonged to the same local.

10. The collective agreement referred to above expired on June 30, 1978. Bargaining for new collective agreements was this time conducted on a local by local basis. On September 23, 1978, *Local 219* entered into a collective agreement with the



respondent, having an expiry date of June 30, 1980. The heading, recognition clause, and signature clause of this agreement read as follows:

"THIS AGREEMENT ENTERED INTO this 23rd day of September 1978.

CANADA CEMENT LAFARGE LTD., a body corporate,  
having its head office in the City of Montreal,

hereinafter called the 'Company'

PARTY OF THE FIRST PART;

AND

UNITED CEMENT, LIME & GYPSUM WORKERS INTER-  
NATIONAL UNION, A.F.L.-C.I.O.-C.L.C., in behalf of its  
Local Union 219 - Bath, Ontario and Toronto Warehouse,

hereinafter called the 'Union'

PARTY OF THE SECOND PART

• • •

## ARTICLE II

### RECOGNITION

The Company recognizes the Union as the sole collective bargaining agent for all employees at the Bath Plant and Toronto Warehouse.

• • •

SIGNED ON BEHALF OF THE PARTIES HERETO BY THEIR  
DULY AUTHORIZED REPRESENTATIVES:

CANADA CEMENT  
LAFARGE LTD.

(John Redfern)  
President

(Pierre Messier)  
Secretary

UNITED CEMENT, LIME &  
GYPSUM WORKERS  
INTERNATIONAL UNION,  
A.F.L.-C.I.O.-C.L.C.

(Donald G. Burshaw)  
Seventh International  
Vice-President

(Eric Batten)  
District Representative

Witness: (blank)

Wally Hull  
Local No. 219

Witness: (signature  
indecipherable)

(signature indecipherable)  
Local No. 219

Witness: (signature  
indecipherable)

(Burt Vicich)  
Local No. 219, Toronto  
Warehouse Unit

August 1978.”

It is to be noted that on the union side, the agreement was signed on behalf of both Local 219 and “Local No. 219, Toronto Warehouse Unit”.

11. The most recent relevant collective agreement was entered into on September 28, 1981, and had a term of July 1, 1980 to December 31, 1982. The heading and the recognition clause were the same as those portions of the previous collective agreement set out above. The signature page is set out below. It is to be noted that again the agreement was signed on behalf of both Local 219 and “Local No. 219, Toronto Warehouse Unit”.

“SIGNED ON BEHALF OF THE PARTIES HERETO BY THEIR  
DULY AUTHORIZED REPRESENTATIVES:

CANADA CEMENT  
LAFARGE LTD.

UNITED CEMENT, LIME &  
GYPSUM WORKERS  
INTERNATIONAL UNION,  
A.F.L.-C.I.O.-C.L.C.

(John D. Redfern)  
President

(Donald G. Burshaw)  
Seventh International Vice-  
President

(Pierre Messier)  
Secretary

(Eric Batten)  
District Representative

Witness: (signature  
indecipherable)

(Robert B. Ostofi)  
Local No. 219

Witness: (signature  
indecipherable)

(Burt Vicich)  
Local No. 219, Toronto  
Warehouse Unit

September 28, 1981”

12. The evidence indicates that there has not been any interchange of employees between the Bath plant and the Toronto Warehouse, and that job vacancies at one location have not been posted at the other. Further, each location has been treated as a separate seniority unit.

13. The letter of May 19, 1977 clearly indicates that although the respondent was agreeable to recognizing the transfer of jurisdiction from Local 377 to Local 219, it

was on the understanding that the Toronto employees would remain a separate bargaining unit. Subsequent to that date, the parties were free to alter the situation by agreeing to merge the Bath and Toronto units into one. Although since then the two units have been covered by the same collective agreement, (along with a number of other units in the 1977-78 agreement), we are satisfied from the wording of the agreements, and in particular the reference on the signing pages to "Toronto Warehouse unit", that no agreement was ever reached to formally merge the two units into one. Rather, the respondent and the intervener carried forward into their collective agreements the two units for which the intervener had separately acquired bargaining rights. We are accordingly satisfied that the employees at both Toronto and Bath were represented by the intervener in separate bargaining units. In this regard see both the *Milltronics* case referred to above, and the *Ontario Hydro* case [1978] OLRB Rep. Aug. 754.

14. Having regard to our reasoning set out above, we are satisfied that the two units set out in paragraph 16 below, constitute separate units of employees appropriate for collective bargaining.

15. Having regard to the membership evidence filed by the applicant, the Board is satisfied that more than thirty-five per cent of the employees in each of the bargaining units were members of the applicant on the date that the application was filed. As already indicated, the applicant was selected by a majority of those employees in each bargaining unit who cast ballots in the pre-hearing representation votes.

16. Certificates will now issue to the applicant with respect to the following two bargaining units.

*Bargaining Unit #1*

All employees of the respondent at its warehouse in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and technical staff.

*Bargaining Unit #2*

All employees of the respondent at its plant at Bath, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and technical staff (which shall not include electronic technicians) and office employees covered by a subsisting collective agreement.

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**1907-82-M Cochrane Temiskaming Resource Centre, Applicant, v. Ontario Public Service Employees Union, Local 664, Respondent**

**Employee – Employee Reference – Practice and Procedure – Reconsideration – Prior reference to exclude residence supervisors dismissed – Employer making second request for exclusion – No grounds to reconsider earlier decision – Second application filed during term of collective agreement untimely in absence of allegation of changes**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

**DECISION OF THE BOARD;** February 15, 1983

1. The Board is in receipt of a letter dated January 6, 1983. That letter begins:

Dear Sir:

This is to officially make application to have our Residence Supervisors exempt from the Ontario Public Service Employees Union which has been certified at our Centre since 1976.

We had made application concerning this in October 1980 which was heard and a decision not to exempt the Residence Supervisors at that time was handed down in April 1981 (File No. 1688-80-M).

The letter then goes on to articulate a number of reasons why the Residence Supervisors ought to be excluded from the bargaining unit, including a recommendation to that effect by the Ministry of Community and Social Services, the fact that they are excluded at a number of other Centres, and various arguments relating to the duties which the Residence Supervisors perform.

2. The trade union in its reply disagrees that the Residence Supervisors are "managerial", but more particularly states:

In the light of a previous application to the Board on this same issue, we ask that the Board dismiss this application in that it brings nothing further of significance forward that was not considered in the earlier decision.

3. The trade union's characterization of the applicant's letter appears to the Board to be accurate. A determination by the Board must be made solely on the basis of the actual duties and responsibilities as they exist at a particular place of employment. The situation at other places of employment is irrelevant for the Board, as the precise facts may be different, and indeed do not even provide a basis for comparison unless the Board itself has been called upon to make a determination respecting those other places of employment. Nor does the recommendation of the Ministry have any bearing upon the quasi-judicial determination which the Board is required to make. The applicant does not appear, apart from those references, to put forward any suggestion of *changes* to the duties and responsibilities of the Residence

Supervisors since the time of the Board's prior determination. Indeed, the job description filed with the application in support of the applicant's position was generated February 1, 1978 and shows no amendments of any kind since August of 1979. Rather, the applicant appears to be attempting to present to the Board a stronger argument and, more significantly, better evidence from its point of view, than it chose to do the first time around. But it appears that all of this was available to the applicant during the course of the Board's prior determination, and it was the responsibility of the applicant (and not the Board) to bring any such matters forward in support of its case at *that* time. The applicant's letter really amounts to a request for reconsideration of the Board's earlier decision. But as the Board has stated, for example, in *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320:

11. Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence ... or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously. (*International Nickel Co. of Canada Ltd.* [1963] OLRB Rep. 234, 64 CLLC ¶15,493 (Ont. H.C.); *Detroit River Construction Case* (1962) CLLC ¶16,260). Both legs of this principle depend upon the applicant having been diligent and therefore having had no opportunity to draw the Board's attention to the object of its concern.

No basis for reconsideration exists in the present case.

4. Nor will the Board deal with this as a fresh application under section 106(2) of the Act. That section provides:

106.-(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

Where a determination of "employee" status has already once been made, the Board has expressed the basis upon which subsequent applications may be brought as follows:

4. ... Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) [now 106(2)] of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party, having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a "question" exists as to the status of that person. More recently, the Board has liberalized this policy

so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. Parties therefore are no longer bound indefinitely to the terms of an initial agreement. The Board will not, however, permit an application (other than one relating to *changes* in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan. 18). Nor will it permit a full application to be brought during the term of a collective agreement, unless it is satisfied either that the position is a new one arising during the term of the collective agreement, or that the applicant prior to entering into the collective agreement expressly reserved its right to bring a subsequent section 95(2) application on the person in dispute. Otherwise the applicant will be taken to have acquiesced in the position of the other party, and to have accepted it at least for the term of that collective agreement. The Board upon receipt of an application under section 95(2) during the term of a collective agreement therefore automatically limits the appointment of a Board Officer to inquiring into changes in the duties and responsibilities since the date the agreement was entered into (e.g. *Ontario Hydro*, [1975] OLRB Rep. July 560).

*Westmount Hospital*, [1980] OLRB Rep. Oct. 1572.

Here the parties are in the course of a collective agreement, so that, even if the Board were to find it could entertain a second 106(2) application on the very facts already adjudicated upon, it would not do so at the present time.

5. The application is accordingly dismissed.
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**0878-82-R** Service Employees Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.L.C., Applicant, v. **Dewson Private Hospital Limited**, Respondent

Certification – Employee – Employee approaching retirement loaned \$5,000 by employer to buy truck – Continuing employment beyond retirement age without receiving wages to pay back loan – Whether employment status continued after retirement age

**BEFORE:** Rory F. Egan, Vice-Chairman, and Board Members E. J. Brady and B. K. Lee.

**APPEARANCES:** *H. Goldblatt and A. Ferrens for the applicant; Brian P. Smeenck and L. W. Freeman for the respondent.*

**DECISION OF THE BOARD;** February 14, 1983

1. Pursuant to the decision of the Board dated August 25, 1982, a Labour Relations Officer inquired into and reported to the Board on the list filed by the respondent and upon the composition of the bargaining unit.
2. The Board held a hearing for the purpose of considering the representation of the parties as to the accuracy of the report or as to the conclusions the Board should reach in view of the report.
3. The Labour Relations Officer reported to the Board that the parties agreed that A. Banate, J. Fotr, T. Villaruz, E. Wagner and H. Ke be excluded from the bargaining unit as they are employed as graduate nurses.
4. There remains in dispute the status of C. Dirollo, R. Harper and D. Marinelli. The applicant seeks the exclusion of C. Dirollo and R. Harper on the grounds that they exercise managerial functions within the meaning of the Act. The applicant sought the exclusion from the bargaining unit of D. Marinelli on the grounds that he was not an employee of the respondent on the date of the application. The applicant had also sought the exclusion of Marinelli as a person regularly employed for not more than 24 hours per week. The union, however, did not press that position at the hearing.
5. Having considered the evidence contained in the Officer's report and the submissions of counsel for the parties with respect thereto, the Board finds that R. Harper, classified as First Cook, exercises managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act* and is accordingly excluded from the bargaining unit. The Board further finds that while C. Dirollo, classified as House-keeper, has some very minor supervisory functions to perform, they are not such that they would involve her in any conflict of interest with respect to duties or loyalties between union and management that would in any way warrant her exclusion from the bargaining unit. The Board finds accordingly that C. Dirollo does not exercise managerial functions within the meaning of section 1(3)(b) of the Act and that she is included in the bargaining unit.

6. It was the contention of the applicant that D. Marinelli was not an employee of the respondent at the date of the application and that his name should accordingly be removed from the list.

7. The facts are that Marinelli had worked for the respondent as a maintenance man for some six to seven years. In June of 1982, he became sixty-five and a recipient of the Canada Pension. His evidence is that shortly before his sixty-fifth birthday and in contemplation of his retirement, he told his employer, Mr. Freeman, that he wanted to buy a truck "to enjoy later pension time" [sic].

8. Mr. Freeman loaned the grievor \$5,000.00 to buy the truck and the grievor agreed to continue to carry on his usual work for the respondent and the respondent agreed to credit him at the rate of \$334.00 per week until the \$5000.00 was repaid. The grievor did not cease to work on June 7th, 1982, the day he became 65, but continued his employment at the same hours per day and week as he had worked before June 7th. He kept a record of the days worked and at the time of the Examiner's report had sufficient credit on the arrangement to discharge the \$5,000.00 loan plus a slight surplus. He was unsure as to what arrangements were to be made as to his future remuneration if he continued to work.

9. The \$334.00 per week appears to have been the equivalent of the grievor's net pay before the loan was made. No deductions were made from the \$5,000.00 nor were any made from the \$334.00 credits as they accumulated. Otherwise the relationship between the employer and employee remain unchanged.

10. It is the view of the Board that at the time the application for certification was made the grievor was an employee of the respondent notwithstanding the accommodation that was reached with respect to the repayment of the \$5,000.00. At the material time, no actual break in the employee's service had taken place and his duties and responsibilities had not been altered. The only change in the relationship, as we view the evidence, was that the employee received an advance on his prospective wages in order to allow him to buy a truck. As to what was to happen when the \$5,000.00 was repaid there is little *evidence*, except that he anticipated a continuation of employment at a wage to be negotiated.

11. D. Marinelli's name should remain on the list as an employee of the respondent on the date of the application.

12. In the result the Board directs that the ballots cast in the representation vote, including the segregated ballots, if any, cast by C. Dirolo and S. Marinelli, be counted.

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**1845-82-R Alexandra Eadie, Applicant, v. Canadian Union of Public Employees, Respondent, v. The Doctors Hospital, Intervener**

**Termination – Timeliness– Effect of *Bill 179* on first contract negotiations – Normal procedures other than compensation increases unaffected – Termination application untimely under *Hospital Labour Disputes Arbitration Act***

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and Stewart Cooke.

**APPEARANCES:** *Alexandra Eadie on her own behalf; G. Brian Atkinson and George Maingot for the respondent; Brian R. Gatien, Paul A. Biggin and Patricia Crowley for the intervener.*

**DECISION OF THE BOARD;** February 4, 1983

1. This is an application for a declaration terminating bargaining rights. Because of the employer is a “hospital” governed by the provisions of the *Hospital Labour Disputes Arbitration Act*, the timeliness of this application must be determined with regard to section 12(1) of the Act. Section 12(1) provides:

Notwithstanding section 61 of the *Labour Relations Act*, where a trade union that has been certified as bargaining agent for a bargaining unit of employees of a hospital has given to the employer of such employees notice under section 14 of that Act and the Minister has appointed a conciliation officer, an application for a declaration that the trade union no longer represents the employees in the bargaining unit determined in the certificate may be made only in accordance with subsection 57(2) of the *Labour Relations Act*.

Section 57(2) of the *Labour Relations Act* provides:

Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the com-



mencement of the last two months of its operation, as the case may be;

- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

2. The facts material to the issue before us are not in dispute. The respondent Local 1474 was certified by the Board for the Hospital's "clerical" employees on December 23, 1981. The respondent then on January 26, 1982, served the Hospital with the notice to bargain, pursuant to the provisions of section 14 of the *Labour Relations Act* (which applies to these parties except as modified by the *Hospital Labour Disputes Arbitration Act*). The parties held a couple of meetings in the spring, resulting in the implementation of some interim changes in working conditions, but did not reach a collective agreement.

3. Local 1474 also holds bargaining rights for the "service" employees of this Hospital, and the most recent collective agreement covering that group had an expiry date of September 29, 1982. Local 1474 accordingly served notice to bargain with respect to the "service" group on June 29, 1982. From that point it was agreed by Local 1474 and the Hospital that negotiations for both units could best be carried out on a joint basis (although the collective agreements to be ultimately signed would remain separate).

4. The other relevant development was that in July of 1982, the Canadian Union of Public Employees and its affected Locals entered into a Memorandum of Agreement with certain "Participating Hospitals" to refer certain specified issues to "central" bargaining, and to remove those issues entirely from the ambit of local negotiations. The Doctors Hospital was one of those "Participating Hospitals", and both its "clerical" and its "service" units are spelled out in the Memorandum as being included. Paragraph one of the Memorandum provided:

The issues for central bargaining shall be determined by the Central Negotiating Committees and may include but shall not go beyond those set out in Appendix "D" attached hereto.

The list in Appendix "D" included:

Purpose  
Strikes and Lockouts

No Discrimination  
Union Security

Union Representations	Labour Management Committee
Grievance Procedure	Arbitration
Discharge, Suspension and Discipline	Job Security
Seniority	Promotions
Hours of Work	Overtime
Shift Premium	Paid Holidays
Vacations	Sick Leave
Leave of Absence	Payment of Wages
Health and Welfare Benefits	Health and Safety
Workload	Previously Agreed Standard
Superior Benefits	Clauses
Part-time Employees	Term

Paragraph 1 went on to provide:

Apart from the negotiations conducted between the two Central Negotiating Committees, there shall be no bargaining by the Local Unions with any Participating Hospital or Hospitals with respect to any central issue and any agreement on any central issues arising from any unauthorized bargaining shall be null and void.

Paragraph 2 also provided:

All issues other than those identified by the parties as central issues will be considered local issues and negotiated between each Local Union and each Hospital.

5. The local committees for The Doctors Hospital met on September 7, 1982, and their negotiations culminated in the drafting of a Memorandum of Settlement with respect to all "local" issues in dispute. This Memorandum remained subject to ratification by the two parties prior to execution. The Hospital asserts that the effect of ratification and execution of this document would have been to "sign off" all "local" issues, although no collective agreement would have been reached until negotiation of the "central bargaining" issues had been completed and ratified. What in fact occurred, at that point, however, is that the introduction of *Bill 179* (the *Inflation Restraint Act*, 1982) was announced in the Legislature, and Local 1474 pulled back from ratifying the Memorandum on "local" issues.

6. Nothing more then happened at the local level with respect to negotiations for the two bargaining units which Local 1474 represented at The Doctors Hospital. What activity there was took place at the "central" level, and it appears that a joint application for the appointment of a conciliation officer was made for all of the "Participating Hospitals" at that stage. The Ministry of Labour granted the appointment by letter dated September 29, 1982. That letter reads:

September 29, 1982

File No. 82-1355

Ontario Hospital Association,  
150 Ferrand Drive,  
Don Mills, Ontario  
M3C 3E5

*Attention: Mr. Allan Shakes*

Re: The Labour Relations Act; and

The Participating Hospitals; and Canadian Union of Public  
Employees on its own behalf and on behalf of each of its Local  
Unions.

*Conciliation Officer: Mr. F. D. Kean*

Dear Sir:

I wish to advise that the Minister of Labour has appointed the above-named as Conciliation Officer to confer with the parties and to endeavour to effect a collective agreement between them.

It should be noted that a Bill was introduced in the Legislature on September 21st respecting the Restraint of Compensation in the Public Sector which, if enacted, may affect rights and obligations of the parties under the *Labour Relations Act* and, in particular, the continuation of this conciliation proceeding.

Yours very truly,

T. E. Armstrong, Q.C.  
Deputy Minister

/ff

Once again, there is no dispute that The Doctors Hospital was one of the "Participating Hospitals" covered by that appointment. Central negotiations continued until mid-December, when *Bill 179* was actually passed by the Legislature, and the parties adjourned to assess its impact. On December 29, 1982, the present application was filed by Alexandra Eadie, an employee in the bargaining unit, to terminate the respondent's "clerical" bargaining rights. The only other fact which the Hospital puts forward as relevant is that subsequent to this, the central bargaining committees met on three occasions without the assistance of the conciliation officer, and entered into a final Memorandum of Settlement.



7. To understand the issues in this case, it is important to recognize that, absent any impact from *Bill 179*, the present application would be clearly untimely. Under the collective bargaining scheme established for "hospitals" under the *Hospital Labour Disputes Arbitration Act*, the appointment of a conciliation officer following the initial certification of a trade union ousts any termination application until the last two months of the parties' *first collective agreement*. Given the absence of the right to strike, in other words, the Act specifically contemplates at least one collective agreement before a termination application may be brought. As the Board observed in *Birchcliff Nursing Home*, [1975] OLRB Rep. April 384:

6. The effect of section 9 [now 12] is that where, following certification and notice under section 13 [now 14] of The *Labour Relations Act*, a conciliation officer is appointed, an application for termination of bargaining rights can only be made in the open period of the collective agreement which is subsequently concluded. Pursuant to the provisions of The *Hospital Labour Disputes Arbitration Act*.

7. The entitlement to apply under section 53(1) [now 61(1)] of The *Labour Relations Act* for a declaration terminating bargaining rights following certification, and before a collective agreement is concluded, is quite different. Under section 53(1) [now 61(1)] such an application may be made following the exhaustion of conciliation procedures – more precisely, after conciliation has been concluded and the time limits stipulated under sections 59(1) (a), (b) or (c), [should have read 53(1); should now read 61(1)] as the case may be, have elapsed. However, in the case of a "hospital" within the meaning of The *Hospital Labour Disputes Arbitration Act*, where the right to strike (or lock out) has been replaced by compulsory arbitration, the appointment of a conciliation officer operates to bar an application for termination until the conditions stipulated in section 49(2) [now 57(2)] of The *Labour Relations Act* have been met: i.e., until a collective agreement has been concluded, and then only within the open period (as set out in sections 49(2) (a), (b) or (c), [now 57(2)] as the case may be) of that collective agreement.

Similarly, see *Nel Gor Castle Nursing Home*, [1979] OLRB Rep. Oct. 1013.

8. There is no question that in this case a conciliation officer has been appointed. Counsel for the Hospital argues, however, that the passage of *Bill 179* alters the situation. He points to the fact that the appointment of the conciliation officer was, in his words, made "subject to *Bill 179*", and that the *Inflation Restraint Act* itself, by virtue of section 36, is "deemed" to have come into force on the 21st day of September, 1982. In particular, counsel relies on the provisions of section 15 of that Act, which provides:

The parties to a collective agreement that includes a compensation plan that is extended under section 11 may, by agreement, amend

any terms and conditions of the collective agreement other than compensation rates or other terms and conditions of the compensation plan.

Counsel points to the fact that amendments under that section may only take place "by agreement". Since it is *disagreement* which gives rise to the need for conciliation, he argues, the logical inference from this section is that the Ministry's conciliation services no longer have a role to play under the *Inflation Restraint Act*, and are rendered void. If the parties are not able to "agree" on changes, nothing remains except the legislated compensation-rate increases provided by the Act, or resort to the Inflation Restraint Board for a ruling. The normal rights of strike, lock-out, or interest arbitration (together with conciliation services themselves) he argues are abrogated entirely by the new statute. And when the Act was given retroactive effect to the date September 21, 1982, counsel concludes, it had the effect of vitiating or cancelling the officer's appointment which took place on September 29th.

9. Counsel submits that the view he takes of the *Inflation Restraint Act* is reinforced by the opening words of section 8(1). Section 8(1) provides:

*Notwithstanding any other Act, except the Human Rights Code, 1981, and section 33 of the Employment Standards Act, every compensation plan that is in effect on the 21st day of September, 1982, shall be continued without change to and including its scheduled expiry date.*

(emphasis added)

The Board notes, however, that those words have no impact where there is no incompatibility between the *Inflation Restraint Act* and "any other Act" of the Legislature. Counsel's argument must be considered further, therefore, in order to determine whether any such incompatibility exists in this case.

10. The *Inflation Restraint Act* by its terms sets, for a limited period of time, statutory restraints on the levels of compensation increase to be afforded a wide variety of employees in the public sector. The Board was called upon to consider for the first time the impact of that Act, and its relationship to existing collective bargaining statutes, in the recent unreported decision in *Broadway Manor Nursing Home*, and *Fiddick's Nursing Home Limited*, [1983] OLRB Rep. Jan. 26. The Board stated:

21. ... we accept the submissions of the applicants that every effort should be made to interpret Bill 179 in a manner which does not interfere with the rights of employees under the *Labour Relations Act*. The *Labour Relations Act* establishes procedures whereby employees may select and be represented by a trade union of their choice, bargain collectively with their employer through their duly certified bargaining agent, and, at certain prescribed times, resort to economic sanctions against their employer in support of improved terms and conditions of employment, or, if covered by the *Hospital Labour Disputes Arbitration Act*, apply for the appoint-

ment of an arbitrator. The rights established under the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act* ought not to be interfered with by the operation of another statute unless it is manifestly clear on a reading of the other statute that such a result is intended. Even if we accept, as clearly we must on a reading of *Bill 179*, that compensation is to be regulated during the period of its operation, it does not necessarily follow that *Bill 179* abridges the right of employees under the *Labour Relations Act* to choose a bargaining agent at the times prescribed in the *Labour Relations Act* or to bargain collectively in respect of non-compensation matters. This tribunal, with its special expertise in labour relations, recognizes the importance of non-compensation terms and conditions of employment such as seniority, layoff and recall (especially in a time of recession), health and safety, grievance procedure and management rights. Notwithstanding the regulation of compensation, meaningful and substantial collective bargaining is nevertheless possible. We begin our analysis of the statutory language of *Bill 179*, therefore, from the perspective that, where the purpose of the Bill is to restrain compensation *and where there is no language in the Bill expressly abridging the right of employees to choose a bargaining agent, to request conciliation or to engage in a legal strike* under the *Labour Relations Act*, every effort should be made to harmonize the two statutes so as to preserve intact as much of the *Labour Relations Act* as is possible.

(emphasis added)

The Board was there faced with the impact of *Bill 179* on negotiations for the *renewal* of a collective agreement, and more specifically, whether *Bill 179* has the effect of *extending the term of the collective agreement*. At issue was the timeliness of an application for certification filed to displace the incumbent trade union. The "open period" provided for in section 5(4) of the *Labour Relations Act* for the filing of such applications begins with "the last two months of the collective agreement", so that if by operation of *Bill 179* the collective agreement is extended, the "open period" would be deferred. The expiry date of the collective agreement is, of course, also the reference point for the giving of notice to compel bargaining for renewal of the collective agreement under section 53 of the *Labour Relations Act*, which in turn triggers the right to request the appointment of a conciliation officer under the Act. (See section 16 of the *Labour Relations Act*.) The Board in *Broadway Manor* and *Fiddick's Nursing Home*, *supra*, went on to note as a practical matter:

22. ... It is important, for purposes of interpreting the relevant provisions of *Bill 179*, to recognize the strong nexus between representation rights and collective bargaining under the *Labour Relations Act* and the manner in which representation rights, collective bargaining and the right to resort to economic sanctions fit together as part of an integrated whole. Notwithstanding our natural attraction to the interpretation of *Bill 179* advanced by the applicants, there would be little point in straining the language of



the Bill to preserve the open periods provided under the *Labour Relations Act* if the Bill could not also be interpreted as preserving some form of meaningful collective bargaining.

11. Section 13 of the *Inflation Restraint Act* reads:

Notwithstanding any other Act except the *Human Rights Code, 1981* and section 33 of the *Employment Standards Act*, but subject to section 14, the terms and conditions of,

- (a) every compensation plan that is extended or made subject to this Part under section 9 or 11; and
- (b) every collective agreement that includes such a compensation plan,

shall, subject to this Part, continue in force without change for the period for which the compensation plan is extended or made subject to this Part.

And section 15, quoted earlier, provides:

The parties to a collective agreement that includes a compensation plan that is extended under section 11 may, by agreement, amend any terms and conditions of the collective agreement other than compensation rates or other terms and conditions of the compensation plan.

The Board in *Broadway Manor* and *Fiddick's Nursing Home* ultimately concluded:

29. The language of section 13 of *Bill 179*, when read in the context of the Bill as a whole, forces us to the conclusion that it was intended to extend the collective agreements brought within its ambit. The effect of this interpretation is to close out the open periods provided in the *Labour Relations Act* at the commencement of the last two months of the operation of a collective agreement. This interpretation has a dramatic effect upon the operation of the *Labour Relations Act* in respect of representation applications, notice to bargain, appointment of conciliation officers and the right to strike or lockout. However, section 13 of *Bill 179* is expressly made to operate "notwithstanding any other Act"...

30. ... In our view, the relevant language of *Bill 179* does not admit to more than a single reasonable interpretation. The Bill extends the operation of collective agreements which would otherwise cease to operate and, in so doing may render untimely a representation application or prevent the appointment of a conciliation officer and consequently abridge the right to strike or lockout

under the *Labour Relations Act* or the right to an arbitrator under the *Hospital Labour Disputes Arbitration Act*.

12. That, however, was a “renewal” situation. Critical to the Board’s determination in that case, and to the Hospital’s argument in the present one, is the interpretation of section 15 of the *Inflation Restraint Act*. But that section speaks of “the parties to a collective agreement”, and to amending any of the terms and conditions “of the collective agreement”. It is simply not possible to bring the present situation of bargaining for a first agreement within the ambit of that section. And counsel for the Hospital could point to no other section in the *Inflation Restraint Act* which creates a necessary conflict between that Act and the normal procedures available to collective-bargaining parties under the provisions of the *Labour Relations Act* or the *Hospital Labour Disputes Arbitration Act*. Section 13(b), for example, which provides for the continuance of the terms and conditions of “collective agreements”, once again has no application to first-contract bargaining, and that subsection therefore raises no conflict with the normal rights available to parties in a first-contract situation. It is true that under section 13(a), the terms and conditions of “compensation plans” are extended and controlled, but there is nothing on the face of that stipulation which would cause one to conclude that normal collective bargaining is ousted. Obviously the substance of those negotiations may be affected by the restraints placed on “compensation” increases by the statute, but it in no way follows from that that any remaining scope for collective bargaining would be superfluous. We repeat once again the words of the Board in *Broadway Manor* and *Fiddick’s Nursing Home*, where the Board in paragraph 21 stated:

... This tribunal, with its special expertise in labour relations, recognizes the importance of non-compensation terms and conditions of employment such as seniority, layoff and recall (especially in a time of recession), health and safety, grievance procedure and management rights. Notwithstanding the regulation of compensation, meaningful and substantial collective bargaining is nevertheless possible.

And beyond that, section 12(1)(d) (in contrast to section 12(1)(c) which *fixes* the level of compensation increase under *existing* collective agreements) provides for compensation rates to be increased:

(d) in any other case, “by *not more than 5 per cent*”.

While the primary thrust of this subsection would appear to be directed at unorganized groups of employees, its effect for first-contract situations is that not even the issue of “compensation” increases are entirely removed from the scope of bargaining. There are, therefore, a host of matters left to be bargained about in a first-contract situation, and we find that the Legislature has left the parties’ avenues for doing so virtually intact.

13. In conclusion, therefore, we find that for the consummation of “first” collective agreements, the normal rights and obligations arising under either the *Labour Relations Act* or the *Hospital Labour Disputes Arbitration Act* are unaffected by the

passage of the *Inflation Restraint Act, 1982*, except insofar as that latter Act places a ceiling on the level of "compensation" increases. This means, for example, that conciliation services remain available at the request of a party under section 16(1) of the *Labour Relations Act*, together with the normal rights to strike, lock-out, or, in the case of a "hospital" resort to third-party interest arbitration. In this regard, section 3 of the *Hospital Labour Disputes Arbitration Act* provides:

4. Where the Minister has informed the parties that the conciliation officer has been unable to effect a collective agreement, the matters in dispute between the parties shall be decided by arbitration in accordance with this Act.

14. This result for first agreements may, at first glance, appear inconsistent with the result the Board was forced to arrive at in *Broadway Manor* and *Fiddick's Nursing Home*, *supra*. But in "renewal" situations such as the latter cases, it must be borne in mind that the parties already have in place a large assortment of collectively-bargained conditions to provide a legal framework for the work place, and in those circumstances, it is less striking to find that the parties have been asked by the Legislature to live with those conditions (unless they agree otherwise) for the further period stipulated by the *Inflation Restraint Act*. No such framework exists in the context of negotiations for a first agreement.

15. As noted in the cases cited earlier, if this were a case involving parties who are subject only to the provisions of the *Labour Relations Act*, the appointment of a conciliation officer would only defer termination or displacement applications until the conciliation process had been exhausted. See sections 57(1) and 61(1) of the *Labour Relations Act*. But in the "hospitals" context, the appointment bars a termination application at least until the end of the first collective agreement (whenever, under the provisions of the *Inflation Restraint Act*, that may be). And in this case there indisputably *was* a conciliation officer appointed. How does counsel for the Hospital get around that?

16. The argument put forward, once again, is that the appointment of an officer for The Doctors Hospital's clerical unit was part and parcel of the appointment for all of the units being combined for the purpose of central bargaining, most of which units were involved in negotiations for the *renewal* of existing collective agreements. And when, by operation of law, conciliation was abrogated or cancelled for *those* units by the passage, retroactively of *Bill 179*, conciliation for The Doctors Hospital's clerical unit was abrogated as well; the appointment of a conciliation officer not having been made for The Doctors Hospital standing alone, counsel argues, it could not continue in effect by itself once the appointment, as it affected the remainder of the hospitals, ceased to exist.

17. The Board does not agree. To begin with, the agreement for joint bargaining did not create a single bargaining unit for which the agreement which the appointment of a conciliation officer was made. There is no question but that at the end of the central negotiations, individual collective agreements for each hospital would be the product. There were simply two parts to each Hospital's final collective agreement, one



made up of the issues designated as "central", and the other of issues which were solely local. As the Memorandum on Joint Bargaining provided:

... all provisions not included in the attached Appendix "D" [i.e. "central" issues], whether or not such provisions are altered in the above noted local negotiations, shall form a separate appendix to the Central Agreement at each Hospital and the two documents shall together constitute the Collective Agreement at each Hospital.

Assuming that subsequent "cancellation" of the appointment would provide a way around the words "and the Minister *has appointed* a conciliation officer" in section 12(1) of the *Hospital Labour Disputes Arbitration Act*, that cancellation could only have occurred by operation of law: the Minister himself issued nothing to cancel or withdraw the original appointment. And even assuming that the Board's findings in *Broadway Manor* and *Fiddick's Nursing Home* would cause the Board to conclude that the *Inflation Restraint Act* cancelled the original appointment of the conciliation officer (because he had become redundant) for all of the bargaining units in negotiations for the renewal of their collective agreements, no basis whatsoever would exist for finding that the Act must have operated in the same way with respect to "first-agreement" situations like the present. On the contrary, for the reasons given above, the applicability of conciliation services would clearly remain and there is simply no basis on which to conclude that by operation of law the appointment of the conciliation officer would not (and did not) continue. Whether, after *Bill 179*, negotiations for The Doctors Hospital were completed through the agency of central bargaining (as in fact they were), or whether a collapse in central bargaining had forced the Hospital to work out the so-called "central" issues on its own, we find that the "clerical" bargaining unit continued to have a conciliation officer in place, for whatever extent his assistance was requested or required to complete the outstanding issues.

18. The Board notes further that the Ministry's letter appointing the conciliation officer did not, as argued, make the appointment "subject to Bill 179", in the sense of being made conditional on the question of its passage. Rather, it simply put the parties on notice that a Bill had been introduced in the Legislature which, "if enacted, *may* affect rights and obligations of the parties under the *Labour Relations Act* and, in particular, the continuation of this conciliation proceeding" (emphasis added). As the Board has now determined in the two cases before it, the rights and obligations of parties under the *Labour Relations Act* (and the applicability of conciliation services) are affected by the *Inflation Restraint Act* in bargaining units dealing with the "renewal" of a collective agreement, but are essentially *not affected* in bargaining units dealing with negotiations for a first agreement. The present case deals, of course, with the latter.

19. In conclusion, the Board finds that notice to bargain has been given by the respondent pursuant to the provisions of section 14 of the *Labour Relations Act*, that the Minister "has appointed a conciliation officer", and that the present application, filed prior to the last two months of the first collective agreement, is, pursuant to section 12(1) of the *Hospital Labour Disputes Arbitration Act*, untimely.

20. The application is accordingly dismissed.



## DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. This case demonstrates that, while the *Inflation Restraint Act* places limitations on monetary increases, it does not foreclose on the ability to organize, to negotiate a first agreement and, if need be, to resort to strike or lock-out or, as in this case, interest arbitration in order to arrive at a first collective agreement.

2. No matter how one may view the *Inflation Restraint Act*, as to its need and appropriateness, neither employer nor union members of the Board can be comfortable with the suspension of rights, however temporary that suspension may be.

3. Nevertheless I am of the view that it is not for the Ontario Labour Relations Board to pass judgement on decisions of the Legislature, but, rather, to make findings in the light of existing legislation. It is in this spirit that I fully concur with the decision.

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**0383-82-R** Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Hurdman Bros. Limited**, Respondent

Practice and Procedure – Representation Vote – Person having history of intermittent periods of employment – Not at work on application date or vote date – Board finding person on indefinite lay-off with only tenuous prospects of recall – Not eligible to vote

**BEFORE:** Pamela C. Picher, Vice-Chairman, and Board Members F. W. Murray and P. V. Grasso.

**APPEARANCES:** *Ken Petryshen and Al Lefort for the applicant; S. C. Bernardo, Thomas Rodger, and Paul Dioguardi for the respondent.*

**DECISION OF THE BOARD;** February 15, 1983

1. By a decision dated December 21, 1982, the Board ordered the taking of a representation vote during which the voters would be asked to indicate whether they wished to be represented by the applicant union in their employment relations with the respondent. In the vote taken on January 7, 1983 eight employees voted in favour of the union and eight employees voted against the union. An additional ballot, however, has segregated and not counted. The employer argues that the person casting the segregated ballot, Mr. Y. Laplante, was not entitled to vote while the union maintains that he was. A hearing was convened to entertain evidence and representations from the parties concerning Mr. Laplante's status to cast a ballot in the representation vote taken on January 7, 1983.

2. At the outset of the hearing, the parties agreed upon the following facts:

- (a) The Union's application for certification was filed with the Board on May 21, 1982.
- (b) The terminal date set by the Board was June 3, 1982.
- (c) In view of parallel proceedings before the Canada Labour Board, the parties agreed to adjourn the initial hearing scheduled by the Board to entertain the union's application for certification.
- (d) The matter was ultimately scheduled for hearing before this Board on December 17, 1982.
- (e) On December 17, 1982 the parties agreed to the taking of a representation vote, made the voting arrangements and established the voters list.
- (f) Mr. Laplante's name did not appear on the voter's list. He had been unknown to the union until he appeared at a union organizing meeting held prior to the vote. When he presented himself at the polling station on January 7th, the company objected to his right to cast a ballot. Accordingly, his ballot was segregated on the understanding that his eligibility would be determined by the Board.
- (g) One aspect of the company's business is the transportation of bulk and bag cement for one particular cement company. That cement company determines, at will, whether deliveries of cement are needed or not.
- (h) The company is not a common carrier.
- (i) The company has a machinery moving division, a heavy hauling division, and an equipment rental division.
- (j) The company's employees fall within three groupings: garage and maintenance, riggers and movers as well as truck drivers for float and cement trucks.
- (k) Whenever Mr. Laplante was employed by the company he drove a cement truck.
- (l) Mr. Laplante has been employed by the company during various periods since 1979:
  - (i) On May 28, 1979, Mr. Laplante was hired by the company and worked as a truck driver until he was terminated for lack of work on March 19, 1980.

- (ii) Mr. Laplante was rehired on May 29, 1980 and worked until January 9, 1981. The records show that he was off work on Workmen's Compensation from December 4, 1980, until January 5, 1981.
- (iii) Mr. Laplante was rehired by the company on May 22, 1981 until he was terminated on July 11, 1981 because his driver's license was suspended.
- (iv) Mr. Laplante was not rehired again until July 19, 1982 subsequent to the filing of the instant application for certification. He returned to the company at that time to replace someone on vacation. In mid August, however, he went off work on Workmen's Compensation until mid October of 1982. When Mr. Laplante came off Workmen's Compensation, the company thought it was required to re-employ him. During this period of re-employment he did some work replacing people who were on vacation. Mr. Laplante worked from mid October until November 26, 1982 when he was terminated for lack of work. He has not worked for the company since.
- (m) When Mr. Laplante was terminated on November 26, 1982 for lack of work, he was given a Record of Employment which states that his expected date of recall is "unknown". Mr. Laplante was told by the company that he would be contacted when there was work. No date was set, however, and there was no guarantee that he would in fact return.
- (n) It is possible that Mr. Laplante will be hired in 1983 but given the company's experience in 1982 with the general economy and company's slow down or lack of work, it is unlikely that he will be rehired in 1983.
- (o) The company generally considers Mr. Laplante a "filler". If work becomes available in 1983 calls to two other fillers would precede a call to Mr. Laplante.
- (p) When Mr. Laplante is not working for the company, the company has no contact with him. There is no restriction on Mr. Laplante taking employment elsewhere and whenever Mr. Laplante has been rehired over the years, it has been on an "if you are available basis".
- (q) There is no collective agreement in place affecting the employees.
- (r) There is no individual contract of employment between the company and Mr. Laplante.



3. In its decision dated December 21, 1982 the Board defined the employees who would be entitled to vote in the representation vote on January 7, 1983. The Board stated in paragraph 6 of its decision that,

... all employees of the respondent in the bargaining unit on December 17, 1982 who do not voluntarily terminate their employment or who are not discharged for cause between December 17th, 1982 and the date the vote is taken will be eligible to vote.

The union acknowledges that Mr. Laplante was not actually employed by the company either on December 17, 1982 or on the date the vote was taken. Moreover, counsel for the union acknowledges that on both December 17, 1982 and January 7, 1983 Mr. Laplante was on indefinite layoff with no date set for his return and in fact no certainty that he would return to the company at all in 1983. Mr. Laplante was not employed by the company on the date of the union's application for certification on May 21, 1982, nor was he in the employ of the company thirty days prior to the application date or thirty days thereafter. The union maintains, that in view of his employment history with the company and his regular intermittent periods of employment, Mr. Laplante should be considered an employee of the respondent in the bargaining unit on both December 17, 1982 and January 7, 1983 for the purposes of voting eligibility.

4. In *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. Apr. 461, the Board discussed its guidelines concerning the eligibility of employees to cast ballots in representation votes. At p.p. 464465 of its decision, the Board stated the following:

19. The Board's past decisions give considerable guidance in the application of the rules regarding the eligibility of employees to vote in the selection of a bargaining agent. Employees on lay-off without a definite date of recall have been held ineligible to vote (*Rix Athabasca Uranium Mine Limited*, [1961] OLRB Rep. July 127). The Board has found that a person who was an employee in the bargaining unit on the date the vote was ordered and was promoted to acting foreman on the date the vote was taken was ineligible to cast a ballot, notwithstanding that he later returned to the bargaining unit (*Success Display Limited*, [1971] OLRB Rep. Oct. 636). An employee who was absent on Workmen's Compensation on the date the vote was ordered and on the date the vote was taken, but who had neither quit nor been terminated was found eligible to vote (*Alex's Plumbing and Heating Limited*, [1970] OLRB Rep. 1321). Where, on the other hand, an employee who was absent due to illness had been treated in all respects as terminated and had no real prospect of returning to work, the Board concluded that he was not eligible to vote (*Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723).

20. The Board's rule respecting eligibility to vote has sought to strike a balance. On the one hand the Board recognizes the interest of employees with a stake in future collective bargaining having a

controlling voice in the choice of a bargaining agent. On the other hand it faces the necessity of establishing a democratic process with some finality in situations where employees are subject to varying degrees of turnover...

21. The Board's voter eligibility rules are not intended and do not purport to achieve a standard of perfect decimal point democracy, assuming such a standard can ever be achieved. The rules seek nothing more than to establish a substantially representative group of employees with a minimum of employment continuity for the purposes of certification.

The Board noted in *London District Crippled Children's Treatment Centre* that it has generally concluded that employees on indefinite layoff are ineligible to vote. For similar statements of Board policy, see also *Rix Athabasca Uranium Mines Limited* [1961] OLRB Rep. June 127 and *Canadian Westinghouse Company Limited*, [1966] OLRB Rep. Sept. 372.

5. In *Canac Kitchens Limited*, [1978] OLRB Rep. Aug. 723, the Board at paragraph 4 of its decision stated the following:

In determining the eligibility to vote of a person who is not actually at work (in this case on the date agreed upon by the parties) the Board has regard to the continuance of the employment relationship. In this connection, it is well established that persons on indefinite layoff are not permitted to cast ballots in representation proceedings. As was stated in *Custom Aggregates*, [1978] OLRB Rep. March 215, the Board has taken the view that it would be unfair to allow persons whose prospects for continued employment are so uncertain to participate in the selection or rejection of a bargaining agent. Although the absence of a definite recall date is not, by itself, fatal to a person's eligibility to vote, where, as here, there is no evidence to suggest that, on the date agreed upon by the parties, there was an expectation that the employee would be recalled, the Board will conclude that the layoff was for an indefinite period..." This conclusion must obtain irrespective of whether the person has in fact been recalled by the date of the vote. One of the purposes of choosing a cut-off date (the date of decision or, as in this case, the date agreed upon by the parties) is to minimize the effect of an attempt to recall or hire employees whose views about representation are known.

6. In *S.G.S. Supervision Services Inc.*, [1982] OLRB Rep. Jan. 105 the Board concluded that some employees who were at work on the date the vote was ordered but on indefinite layoff on the date the vote was taken were eligible to vote. The ballots of some twenty-seven employees were segregated in the representation vote taken in the *S.G.S. Supervision* case because while they were cast by persons on the voters list, the individuals had been laid off the day prior to the taking of the vote. A number of the laid-off employees returned to work within some ten days of the vote. Others had not

been re-hired by the time of the hearing. The Board concluded that the persons who had been laid off the day prior to the representation vote and recalled ten days thereafter were eligible to vote but that the persons who had been laid off and not recalled were not entitled to vote. At page 112 of its decision the Board stated the following:

12. The Board is of the view that it would be inappropriate to count the ballots cast by all of the persons who were laid off by the respondent on December 10, 1981 since this would allow some persons whose prospects for continued employment were quite tenuous, to participate in the selection or rejection of the applicant. However, we are also of the view that it would be unfair to disenfranchise those individuals who, at the time of the vote, had substantial and legitimate expectations of being recalled in the near future.

7. Unlike the employees in *S.G.S. Supervision* who were considered eligible to vote, Mr. Laplante was not on the voters list and not at work with the company on the date the vote was ordered. Moreover, in further contrast to the circumstances in *S.G.S. Supervision*, Mr. Laplante had not been recalled to work by the time of the Board's meeting. No date has been set for his recall; although he may be re-employed sometime in 1983, he may not be. There are two other individuals who would be called in before him. In these circumstances the Board must conclude that he is on indefinite lay-off with only tenuous prospects for re-employment. In the Board's opinion, it would be inappropriate to allow an individual with such an uncertain relationship with the company to participate in the critical decision of whether the employees will be represented by a trade union.

8. Accordingly, consistent with its well established jurisprudence, the Board finds that Mr. Laplante was not eligible to cast a ballot in the representation vote taken on January 7, 1983.

9. On the taking of the representation vote directed by the Board, not more than fifty per cent of the ballots cast were cast in favour of the applicant.

10. Accordingly, the application for certification is dismissed.

11. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision, unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

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**1131-82-U Canadian Union of Public Employees and its Local 2664, Complainant, v. Le Patro d'Ottawa, Respondent**

**Change in Working Conditions – Unfair Labour Practice – Change in organizational chart implemented during freeze period – Decision made prior to onset of freeze period but not communicated – Violation – Wage increase not violation**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members W. G. Donnelly and B. L. Armstrong.

**APPEARANCES:** *Mario Hikl and J. Beattie for the complainant; Raimo T. Heikkila, Florent Binet and Maurice Paget for the respondent.*

**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER B. L. ARMSTRONG; February 2, 1983**

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a violation of section 79. The complaint alleges that the employer has violated the freeze provision in section 79 by implementing a new organizational chart and by increasing the wages of employees after it received notice of the union's application for certification.

2. The respondent is a social service agency which operates youth recreation programs in Ottawa. The evidence establishes that on February 24, 1982 the employer's executive council passed a motion to establish the position of "co-ordonateurs" and to eliminate the position of "animateurs" in its organization. On February 26, 1982 the respondent received notice of the complainant's application for certification. In September of 1982 it proceeded to implement the decision of February 24, 1982.

3. The evidence further establishes that Miss Chantale Belanger, a "monitrice", received a substantial increase in wages in September of 1982. The evidence of the union does not, however, rebut the explanation of the respondent's director, Mr. Binet, that this increase was part of an annual review of the wages of employees done on an individual basis in June or September. An earlier 10% increase in wages to all "moniteurs" employed since September of 1981 and approved on February 24, 1982, was also apparently given in the spring of the year.

4. The general principles to be applied to the facts of the instant case were described in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859. An employer with notice of an application for certification is required by section 79 of the Act to conduct its business as it has done in the past, so that the certification process and any ensuing bargaining can take place in an atmosphere of stable terms and conditions of employment. As the Board noted in *Spar*:

23. The 'business as before' approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable



point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

5. The Board has consistently required that a firm decision to substantially change terms and conditions of employment or the privileges of employees must be communicated to the employees prior to the onset of the freeze period. (*Carleton University*, [1978] OLRB Rep. Feb. 184; *Lennox & Addington Hospital*, [1978] OLRB Rep. Sept. 843; *Ottawa General Hospital*, [1981] OLRB Rep. Oct. 1461.) The Board recognizes that for the freeze period to operate effectively it must be in relation to rights and privileges which are known to both the employer and the employees. As the Board noted in the *Carleton University* case, a decision taken before the freeze but known only to the employer could be revoked or altered during the freeze, prior to any communication to the employees, so that neither the employees nor their union, nor for that matter the Board, could effectively enforce the freeze provisions with any certainty. For that reason, in the interest of preserving stability in the employment relationship during the freeze period the Board has interpreted the freeze as applying to the rights and privileges of all parties as they were known to them at the time of the notice triggering the freeze.

6. In the instant case the evidence establishes for some time in 1981 the employer was contemplating various means of upgrading its employees. To this end it established a committee which included a number of employees and it consulted separately with its principal supplier of funds, the United Way (Centraide). Its decision, however, to restructure its work force and to abolish the position of "animateurs" was not communicated to any of the employees nor to the union until some months after it had received notice of the union's application for certification. It should be stressed that this is not a situation such as was found in *Scarborough Centenary Hospital* [1969] OLRB Rep. Jan. 1049 and analogous cases where the Board has found that the freeze was not violated where a course of action was decided upon, communicated to the employees and therefore put in motion before the period of prohibition set in.

7. On the evidence before it the Board cannot conclude that the wage increment paid to Chantale Belanger, albeit unusually generous, was in violation of the statutory freeze. It appears, on the balance of probabilities, to be a merit increase, in keeping with business as before, given on the basis of a periodic review of individual employees' services. The same appears to be true of the increase to all moniteurs in the spring of 1982.

8. The decision, however, to implement the change in the employer's organizational chart, abolishing the positions of animateurs, was not communicated to the

employees prior to the onset of the freeze. That substantial change cannot be said, for the purposes of section 79 of the Act to be "business as before".

9. For the foregoing reasons the Board finds that the respondent has violated section 79(2) of the *Labour Relations Act*. It is hereby ordered to reinstate forthwith all animateurs to their former positions, with compensation for all wages and benefits, with interest, from the date of the change in their status to the date of their reinstatement. This does not appear to the Board to be an appropriate case for a posting order.

#### **DECISION OF W.G. DONNELLY;**

I dissent from the decision of the majority for reasons to follow.

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#### **1685-82-R Canadian Union of Public Employees, Applicant, v. Ontario Cancer Foundation, Hamilton Clinic, Respondent.**

**Practice and Procedure – Representation Vote – Parties mutually agreeing to vote date – Employee on vacation missing opportunity to vote – Board not notified of problem until 5 days after vote – Board upholding vote result in circumstances**

**BEFORE:** Corinne F. Murray, Vice-Chairman, and Board Members F. W. Murray and H. Kobryn.

**APPEARANCES:** *Helen O'Regan for the applicant; Murray G. Levis for the respondent.*

#### **DECISION OF THE BOARD; February 11, 1983**

1. This was a hearing held to receive representations regarding a vote which was conducted by the Board pursuant to an application for certification.
2. The respondent submitted the following by letter to the Board dated January 12, 1983:

Dear Mr. Aynsley:

A representative [sic] vote was held on January 7th at the Hamilton Clinic of the Ontario Cancer Foundation. One of the employees eligible to vote was to be on vacation out of the country on that date, was anxious to vote and expressed the desire to attend an "advance poll" if such could be arranged.

We would ask that you consider the following circumstances:

1. The Board's Voting Notices were not received until Thursday, December 30th although from information on the envelope it would appear as though they were to have been delivered on December 28th. The notices provide no information on the Board's 'position' re advance polls.
2. As part of the New Year's holiday, the Hamilton Clinic was closed on December 31st.
3. As part of the New Year's holiday the Board's offices were closed on January 3rd.
4. The Board's 'silent period' commenced at midnight January 3rd and any action to arrange an advance poll beyond that date could obviously be considered as a breach of the requirement.
5. Mr. Blenkey will return from his vacation and to work on January 17th beyond the Board's closing date of January 14th for representations.

The purpose of this letter is to request that the Board, in the light of the limited time available to him as outlined above, extend the closing date to permit Mr. Blenkey to make his presentation to the Board within a reasonable period following his return.

Yours very truly,

"Murray G. Levis"

Personnel Officer

Mr. John Blenkey was the employee who could not vote and could not make representations until after January 14, 1983, the date set by the Board by which the *parties* to the proceeding must make representations. Neither Mr. Blenkey nor any other employee was a party to the original application for certification nor did he or any other employee have any status, as party, at the vote. In view of this the Board considered the respondent's letter of January 12, 1983 to be a statement of its own position and heard evidence from Mr. Blenkey on the basis that he was a witness of the respondent. It was explained to Mr. Blenkey and other employees who attended the Board's hearing on February 4, 1983, that neither he nor they were parties to the proceedings.

3. It was an undisputed fact that following the Board's decision, dated December 20, 1982, ordering a vote the parties were contacted regarding a suitable date, place and time for such vote and that Mr. Murray Levis, Personnel Officer of the respondent, and Mr. Peter Douglas, representative of the applicant, ultimately agreed between

themselves that January 7th was a suitable date for the vote. Mr. Levis indicated that prior to agreeing to the date he checked with the respondent's office manager, Mrs. Squires, on whether any date after January 5, 1983 was suitable. She indicated it was. Mr. Levis first realized the respondent "had a problem" when sometime on December 30th he learned that an employee in the bargaining unit wanted to vote but would be away because of vacation. This was the first time he considered it necessary to have an advance poll. He did not call the Board to request one because he believed a Mrs. Boutilier, assistant to Mrs. Squires, was calling the Board in this regard. He acknowledged he did not direct her to do so. He also said he did not call the Board because he was not aware an advance poll was a possibility. He claimed that if there had been more days between Friday the 31st of December and Friday, January 7th, which were working days and not included in the silent period, he could have done something to learn about getting an advance poll. The significance of the silent period is that Mr. Levis interpreted this to mean that an advance poll could not have been held prior to January 7, 1983. He therefore did not call the Board regarding this matter on Tuesday, Wednesday or Thursday of the following week. Mr. Levis also did not phone the applicant.

4. Mr. Blenkey testified that he left for his vacation on the night of the 6th and did not return until the 17th of January. He had known since October of 1982 that he would be permitted to be away during this time. He first knew that he would be missing the vote on the 7th of January when he saw the posted Notice from the Board. He went to see Mrs. Squires immediately but in her absence, due to vacation, he told Mrs. Boutilier about his situation. Mrs. Boutilier advised him on Monday or Tuesday that "Head Office" had said there could not be an advance poll. He was also advised by her that the union indicated an advance poll could not be held without its agreement and there was no such agreement. After this point he did not do anything further because he did not know he could. He did not request or contact Mr. Levis prior to or during his vacation to make representations to the Board. Mr. Levis' letter of January 12, 1983 "came to him" when he got back from vacation. He could not recall how.

5. The respondent did not offer any testimony from Mrs. Squires or Mrs. Boutilier. The Board has on file the Certificate of Conduct of Election which Mr. Levis confirmed was signed by Mrs. Squires (who by that time had returned from vacation) on behalf of the respondent. The text of the Certificate states:

Place of Election – Hamilton, Ontario

We, the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the time and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

"R. Alexander"  
For Applicant



"C. E. Squires"  
For Respondent

"J. Bright"  
Returning Officer

There is no evidence that representations were made on January 7th to the Returning Officer by the respondent regarding Mr. Blenkey's inability to vote. Indeed, no complaint was raised regarding this until the letter of January 12, 1983 was sent to the Board and Mr. Blenkey himself had ceased any effort to vote by January 2nd or 3rd. The results of the vote were made known to the parties on January 7, 1983.

6. The Board has determined that the vote, as conducted, should stand. Mr. Blenkey should not be given an opportunity to vote either singly or as a part of a new vote. The most important consideration in coming to this conclusion is the fact that the respondent had input into the date the vote would be held and could have, through careful checking, avoided this situation. The reason why the respondent and applicant and any other party are given the opportunity to have such input is to have the best date, within reason, selected for all parties concerned. There will always be times when all employees cannot vote because of absences due to illness, vacation, etc., but the effort each party must make is to try to find a date when the least number of employees are absent. Even the best effort does not always guarantee employees being 100% present on the day of the vote. The Board seeks the agreement of the parties to ensure that parties are satisfied between themselves that the optimum date has been selected. What appears to have happened here is that the respondent did not make a thorough enough assessment, for whatever reason, of the acceptability of January 7th.

7. The second reason why the Board is refusing the respondent's request is because the respondent failed to take the steps promptly to petition the Board to do something about Mr. Blenkey's situation. The explanation may be a lack of sophistication or misinterpretation of the silent period until the day of the vote. However, it is important to note that the respondent made no complaint even on the day of the vote either immediately before or after the vote itself. It waited until 5 days later to write the Board. The Board was offered no explanation for the lack of action on the day of the vote and the time lag between the vote and the letter of January 12, 1983.

8. Considering all the above therefore, the Board is not prepared to accede to the respondent's representations as set out in its January 12th letter.

9. On the taking of the representation vote pursuant to the Board's direction of December 30, 1982, more than fifty per cent of the ballots cast were cast in favour of the applicant.

10. A certificate will therefore issue to the applicant for:

All employees of the respondent in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, persons covered by subsisting collective agreements, registered nurses and professional treatment and research staff.

11. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision, unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

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**1676-82-R Prescott Machine and Welding Inc., Applicant, v. Energy and Chemical Workers Union and its Local Union No. 1, Respondent**

**Practice and Procedure – Termination – Bargaining not commenced within 60 days after notice given – Union not sleeping on rights – Board not exercising discretion to terminate bargaining rights – Termination provision not intended as means for testing continued employee support for union**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members F. W. Murray and C. A. Ballentine.

**APPEARANCES:** *R. N. Gilmore, M. Baril and L. Shand for the applicant; Henri Gauthier for the respondent.*

**DECISION OF THE BOARD; February 7, 1982**

1. This is an application for a declaration terminating bargaining rights filed pursuant to the provisions of section 59 of the Act.

2. Subsection 59(2) provides that if a trade union fails to commence to bargain within sixty days after it has served notice to bargain on an employer, either the employer or any of the employees in the bargaining unit may apply to the Board for a declaration terminating the union's bargaining rights. The issuance of such a declaration is at the discretion of the Board, and in deciding whether or not to issue a declaration the Board is empowered, but not required, to hold a representation vote. The actual wording of the subsection is as follows:

“59.-(2) Where a trade union that has given notice under section 14 or section 53 or that has received notice under section 53 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.”

3. The purpose of section 59 is to protect employees (and, in a proper case, the employer) against a bargaining agent which neglects to forward the interests of the

employees but instead “sleeps” on its bargaining rights. As the Board has indicated in a number of cases, the section is not meant to be used to penalize a union, but rather is a means by which an interested party can bring the material facts to the attention of the Board so that the Board can call upon the trade union to provide an explanation for its failure to bargain. In instances where the union has not met the time requirements set out in section 59, but has either sought to bargain relatively soon afterwards or has some reasonable explanation for its delay, the Board will generally dismiss the application outright. See, *Trizec Equities Ltd.* [1978] OLRB Rep. Feb. 189 and *Mohawk Construction Limited* [1981] OLRB Rep. Aug. 1156. If, on the other hand, the union has been inactive for a substantial period of time, or if it appears that the union has made a decision not to exercise its rights, the Board will generally terminate its bargaining rights. See, *Darrigo's Supermarkets Ltd.* [1982] OLRB Rep. Jan. 32. It is generally only in those cases where a union has failed to bargain for a fairly lengthy period of time without any reasonable explanation for its delay, but where nevertheless the facts suggest that it is still interested in actively representing the employees, that the Board will direct the taking of a representation vote. See *F.C.M. Construction Limited* [1982] OLRB Rep. May 670.

4. Prescott Machine and Welding Inc. (“the company”) and Energy and Chemical Workers Union, its Local Union No. 1 (the “union”) had been parties to two collective agreements prior to the filing of the instant application. The company is a relatively small firm, which at the time it filed the application employed only five bargaining unit employees. The union is a “composite local” representing the employees of a number of small firms. The local's total membership numbers only some 40 employees. In negotiations with the company, the union's bargaining team is headed up by Mr. Henri Gauthier, a national representative of the Energy and Chemical Workers Union. Mr. Gauthier also services a number of other union locals with a combined membership of some 3,000 employees.

5. The most recent collective agreement between the parties expired on November 20, 1982. On or about September 10, 1982 the company laid off a number of employees, including all of the members of a bargaining committee who otherwise would have assisted Mr. Gauthier in negotiations for a new agreement. On September 15, 1982, Mr. Gauthier, who had yet to be advised of the lay-offs, sent the company notice to bargain on behalf of the union. The notice indicated that Mr. Gauthier would later contact the company in order to set dates for negotiations. On or about September 17, 1982, the company sent a similar notice to bargain to the union.

6. According to Mr. Gauthier, subsequent to serving the notice to bargain on the company, he made a number of telephone calls to the company for the purpose of setting dates for negotiations. However, he failed to make contact with any responsible company official, and did not leave any messages to return his calls because at the relevant times he was “on the road”. At some point, apparently in late September or early November 1982, Mr. Gauthier did talk on the telephone with Mr. Larry Shand, the company's controller. During this discussion they dealt with certain matters connected with the lay-off of an employee. Mr. Gauthier testified that he also advised Mr. Shand that he would not be able to commence bargaining right away because he would need a new negotiating committee. Mr. Shand, however, testified that Mr. Gauthier did not make any reference to negotiations during their discussion.



7. It is undisputed that on November 5, 1982 Mr. M. Baril, the company's general manager, telephoned Mr. Gauthier. Mr. Baril did not initially advise Mr. Gauthier that he was part of management, although he did say that he was with the company and wanted to know what was happening. Mr. Gauthier, believing that Mr. Baril was a bargaining unit employee, stated that he would have to get together with "you guys" within the next couple of weeks to agree on some bargaining proposals. The evidence of Mr. Baril and Mr. Gauthier concerning what happened next differs somewhat. Mr. Baril testified that he advised Mr. Gauthier that he was a member of management, to which Mr. Gauthier replied that he would be meeting with the employees about bargaining proposals. Mr. Gauthier, however, testified that Mr. Baril never told him he was part of management. According to Mr. Gauthier, if he had known that Mr. Baril was part of management he would have discussed possible bargaining dates with him. Mr. Gauthier testified that at that point in time, plans were already underway for him to meet with the company's employees on November 29, 1982. Such a meeting was in fact held on November 29th, during which a new bargaining unit chairman was selected and bargaining proposals drafted. On or about December 3, 1982 Mr. Gauthier telephoned the company with respect to commencing negotiations, but was advised that the company had already filed the instant application.

8. The evidence taken as a whole indicates that although a variety of problems prevented the commencement of negotiations, at no point was it the intention of the union to sleep on, or abandon, its bargaining rights. Further, on the basis of the evidence of the company's own witnesses, it is clear that on November 5, 1982 the company was advised that Mr. Gauthier was planning to meet with the employees within the next couple of weeks to develop bargaining proposals. Notwithstanding this fact, the company filed the instant application on November 29, 1982, just nine days after the expiry of the most recent collective agreement.

9. At the hearing, the company indicated that the real reason that it had filed the application was to seek a representation vote for the purpose of determining whether or not the employees still desired to be represented by the union. In this regard, the company contended that it had some doubts about employee wishes relating to the union. As already noted, the purpose of section 59 is to allow the termination of the bargaining rights of a union which has neglected to act on behalf of the employees. In our view, the section is not meant to be used as a device by which an employer can trigger a representational issue among the employees whenever sixty days have elapsed without any bargaining taking place. In this regard, it should be noted that in accordance with the "regular" provisions of the Act relating to representational applications affecting employees within an established bargaining unit, the company's employees were at liberty on and after September 21, 1982 to file a representation application with the Board for the purpose of terminating the union's bargaining rights. As an alternative, the employees could have selected a different trade union to represent them. As of the date of the hearing, this representation "open period" had still not come to an end. In these circumstances, we are satisfied that the employees had ample opportunity to properly bring a representational application before the Board if that had been their desire.



10. Having regard to the above, we do not believe that this is an appropriate case for the Board to exercise its discretion under section 59(2) to either direct the taking of a representation vote or to terminate the union's bargaining rights outright.

11. The application is accordingly dismissed.

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**0325-82-U; 0326-82-4 Steinberg Inc.** (Miracle Food Mart Division), Complainant, v. Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Sean Floyd, Respondent

Practice and Procedure – Reconsideration – Strike – Unfair Labour Practice – Declaration of unlawful strike sought through s.89 complaint – Principles applied in exercising discretion in s.92 applications also applying in s.89 complaints – Whether s.89 requiring Board to make finding of unlawful strike before exercising discretion as to relief – Board not relied on hearsay evidence – Reconsideration denied

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members C. G. Bourne and C. A. Ballentine.

**DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER C. A. BALLENTINE;** February 15, 1983

1. Counsel for the employer has requested that the Board reconsider its decision in this matter dated September 9, 1982. (Now reported at [1982] OLRB Rep. Sept. 1366.) The Board has received submissions from counsel for the union opposing the employer's request for reconsideration and reply submissions from the employer.

2. The employer filed two complaints under section 89 of the *Labour Relations Act* which were consolidated by the Board. The request for reconsideration does not extend to the Board's dismissal of the employer's complaint that the union acted contrary to section 89(7) of the Act. The request for reconsideration is restricted to the Board's disposal of the employer's complaint that the union violated the provisions of sections 74 and 76 of the Act which generally prohibit the calling, authorizing, threatening or encouragement of an unlawful strike. The remedy requested by the employer for the union's alleged breach of sections 74 and 76 of the Act was that the Board declare that the union breached sections 74 and 76 of the Act and direct the union to post a notice stating that it had violated the Act.

3. At paragraph 24 of its decision, the Board drew the following conclusions:

Having reviewed the evidence and the submissions of the parties, the Board concludes that even assuming, but without finding, that the actions of Mr. Floyd on May 5th constitute a

technical breach of sections 74 and 76 of the Act, we do not in the circumstances of this case consider it appropriate to issue any remedy whatsoever.

4. The first ground of the employer's request for reconsideration is that the Board failed to find whether or not Mr. Floyd and the union violated sections 74 and 76 of the Act and concluded only that even if there had been a violation, the Board, in the circumstances, would not issue a remedy. Counsel maintains that once the Board has undertaken an inquiry under section 89 of the Act, it must determine whether there has been a contravention of the Act and only then go on to consider the question of remedy. Counsel does not dispute the Board's authority to decline to issue any remedy even if it concludes there has been a violation of the Act.

5. The second basis upon which the employer seeks reconsideration of the Board's decision is its contention that the Board acted contrary to its past jurisprudence by applying principles developed by the Board in applications for a declaration of an unlawful strike under section 92 of the Act to a complaint of the same nature lodged under section 89 of the Act. Section 92 of the Act provides as follows:

Where, on the complaint of [an] ... employer ... the Board is satisfied that a trade union ... called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union ... counselled or procured or supported or encouraged an unlawful strike or threatened to engage in an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike, the Board may so declare and, in addition, in its discretion, it may direct what action if any a person ... trade union ... officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

In the instant matter the employer brought its complaint of an unlawful strike and its request for a declaration of such under section 89 of the Act instead of section 92. The parties, including counsel for the employer, agreed that this was the first instance of which they are aware where a complaint of an unlawful strike has been brought under section 89 of the Act instead of section 92.

6. In paragraph 29 of its decision, the Board cited a number of decisions supporting the Board's determination not to grant by way of remedy a declaration of an unlawful strike. Each of those decisions embodies the well-established principles developed by the Board to decide whether to issue a declaration of an unlawful strike under section 92 of the Act. For labour relations considerations well set out in the Board's jurisprudence, the Board regularly declines to issue a declaration of an unlawful strike when the strike is over unless there is either a history or pattern of illegal strikes, a threat of future illegal strikes or public policy concerns carrying the legitimate interest in the matter beyond the immediate parties.

7. Applying these well established principles to the facts before the Board in this matter, it is readily apparent that the employer would not have received a declaration of

an unlawful strike or encouragement thereof if its complaint had been brought under section 92 of the Act. The fifteen minute work stoppage was well over at the time of the Board's hearing and there was no evidence of any previous unlawful work stoppages. Moreover, the Board concluded for reasons fully detailed in its decision that there were no reasonable grounds for the employer to fear that its operation would be disrupted in a similar manner in the future. As well, the situation did not contain overriding public policy interests. Having fully reviewed the circumstances of the matter, the Board was satisfied that there was no reason to grant a declaration simply because the complaint had been brought under section 89 of the Act instead of section 92.

8. As a basis for its request for reconsideration, however, the employer maintains that the Board acted contrary to past jurisprudence by applying the principles it has developed in section 92 applications for a declaration of an unlawful strike to a complaint of an unlawful strike brought under section 89 of the Act. As this is the first matter of which either the parties or the Board is aware that a request for a declaration of an unlawful strike has been brought under section 89 of the Act instead of section 92, it is obvious that the Board has not acted contrary to its past jurisprudence by applying its section 92 principles to a parallel complaint under section 89 of the Act. It cannot be said that simply because the Board does something for the first time it is acting contrary to its past jurisprudence. The Board fully considered the principles it has developed for deciding whether or not to grant a declaration of an unlawful strike or encouragement thereof in a section 92 application and determined that given the underlying basis of those principles it was appropriate in the circumstances before it to decline to grant a declaration of an unlawful strike. The Board's decision in this matter, therefore, is fully consistent with rather than contrary to its past jurisprudence.

9. We turn then to the employer's contention that once the Board undertakes an inquiry under section 89 of the Act, it must make a finding of whether or not there has been a violation of the Act. In this instance, with the alleged violations of sections 74 and 76 of the Act, the finding would necessarily involve the stated determination of whether or not the fifteen minute interruption of work was an illegal strike and/or whether the union through Mr. Floyd called or authorized or encouraged an unlawful strike. The employer maintains that it is only after the Board has made a finding as to whether or not there has been a violation of the Act that the Board can then go on to determine whether or not a remedy should be granted to the offended party.

10. The situation before the Board is unique. The declaration of an unlawful strike or encouragement thereof sought by the employer by way of remedy is virtually the same as a finding of whether or not there has been a violation of the Act. In this case the finding is the remedy. The Board determined in the exercise of its discretion that in the circumstances it would not be appropriate to grant the remedy sought by employer. The Board then declined to make a finding of whether or not there had been a violation of the Act as that very finding was the remedy the Board, in the exercise of its discretion, had determined was inappropriate.

11. Counsel for the employer does not take issue with the Board's decision not to issue a declaration, recognizing that the Board's decision not to issue a declaration by way of remedy falls squarely within the exercise of its own discretion. Seeking through



a different channel what it cannot get by way of remedy, however, the employer insists that the Board has a duty to make a finding of whether or not there has been a violation. When the very finding of a breach of the Act is, under a different name, the very remedy sought by the complaining party, the Board is satisfied that it would defeat the due exercise of its discretion if it were required to make that finding when it has already concluded that the complainant is not entitled to the remedy, i.e. the declaration. In the Board's opinion it would require a clear legislative directive for the Board to be required to nullify the due exercise of its discretion in the manner contended by the employer.

12. We turn to the final basis upon which the employer seeks reconsideration of the Board's decision. Counsel for the employer maintains that the exercise of the Board's discretion not to grant a remedy was tainted because, "the Board . . . relied on hearsay to some extent". Counsel for the employer complains that the Board, "placed emphasis . . . on its finding that the problem giving rise to the May 5th incident was a dispute between two bosses which . . . 'was adversely affecting the employees'". He then asserts that "[t]he evidence concerning the alleged dispute between the two bosses (Messrs. Maharrie and F. Nelson, Jr.) was all hearsay".

13. A number of comments should be made. Firstly, the factual basis of the dispute between the two bosses, that is, what was said to whom to give rise to the dispute, was not the subject of direct evidence before the Board and played absolutely no part in the Board's decision not to exercise its discretion and grant a remedy. Secondly, that Mr. Sean Floyd was *informed* by employees and stewards that the employees were upset about the problem between the bosses and that Mr. Floyd encountered employees in the cafeteria yelling and hollering about this problem is not hearsay. Moreover, that Mr. Floyd informed members of management that the dominant cause of the upset among the employees was the dispute between the bosses was the subject of direct and non-contradictory evidence from members of management, including Mr. Jack Burke (the transportation manager and the person in charge on the day in question) and Mr. John DeSousa (the perishable warehouse manager) as well as Mr. Floyd from the union.

14. Thirdly, the common and direct evidence from both Mr. Floyd and Mr. Burke was that a meeting was convened the day after the incident to discuss the problems giving rise to the May 5th incident. The further common and direct evidence from both witnesses was that one such problem discussed in that meeting was the problem between the two bosses. Moreover, it was further agreed that the two grievances which had been filed over this problem were resolved at the meeting and the employees were paid the monies they had claimed.

15. Although at one point during the giving of evidence counsel for the employer objected to the hearsay nature of evidence concerning the details of the dispute between the bosses, he did not in his submissions to the Board either dispute that the major problem giving rise to the incident, whatever its detail, was a dispute between the two bosses or suggest that such a conclusion would be inappropriate and based solely on hearsay. In argument, counsel made no submissions relating to hearsay evidence at all. Counsel for the union, on the other hand, relied in part in his argument on the evidence of the resolution of the grievances concerning the two bosses to argue that the



underlying cause of the incident in dispute had been resolved. Whether the underlying cause of a disruption is settled is relevant to deciding whether to grant a declaration of an unlawful work stoppage. If counsel for the employer did not agree that the underlying cause of the incident was the dispute between the bosses, or if counsel thought that such a conclusion would be inappropriate and based solely on hearsay evidence, then he had an opportunity and obligation, particularly in view of the union's submissions, to raise his concern about hearsay in argument, but he did not.

16. In any event, it is clear from the evidence that the parties themselves dealt with the problem of the dispute between the bosses as the major cause of the incident. This was not hearsay, but the subject of direct and consistent evidence from Mr. Burke and Mr. Floyd. Moreover, the fact that the problem with the bosses was resolved by the parties in the employees' favour (for whatever reason) at the meeting designed to deal with the underlying causes of the incident, was not hearsay either and was the subject of direct and consistent evidence given by both the employer and the union.

17. The details of the bosses' dispute, which may properly be described as hearsay, were not at all important to the Board's decision not to issue a remedy. No matter what the merits or details of the problem, the Board, for the reasons set out in paragraphs 26 through 29 of its decision, would decline to grant a remedy.

18. The employer's application for reconsideration is hereby denied.

#### **DECISION OF BOARD MEMBER C. G. BOURNE;**

1. I have to agree with the majority of the Board in saying that no new evidence has been adduced which would call for the Board to reconsider its decision.

2. However, I agree with the complainant that the Board is required to make a finding of fact under a section 89 complaint. The matter then resolves into the question of remedy if the circumstances so warrant.

3. The matters raised in my original dissent still remain, and I have found, as fact, that an illegal work stoppage did occur, and, in the circumstances would have required that the Board issue a declaration.

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**1042-82-U Hotel, Restaurant & Cafeteria Employees Union, Local 75, Complainant, v. St. Hubert Bar-B-Q Ltd., Respondent**

**Discharge for Union Activity – Unfair Labour Practice – Grievor mainly responsible for union organization – Quitting shift because of perceived unfair work-load – Leaving customers unattended – No evidence that employer aware of grievor's union activity – Employer satisfying reverse onus that discharge not tainted by anti-union animus**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members F. W. Murray and W. F. Rutherford.

**APPEARANCES:** *Alick Ryder Q.C. and Diane Godin for the applicant; J. P. Wearing and D. Wexall for the respondent.*

**DECISION OF THE BOARD; February 15, 1983**

1. The union has filed a complaint under section 89 of the Act alleging that the grievor, Ms. Diane Godin, was discharged by the employer contrary to the *Labour Relations Act*. The union maintains that the employer's motivation for discharging Ms. Godin was anti union *animus*, in breach of section 66(a) of the Act which provides as follows:

66. No employer ...

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

2. The evidence establishes that the grievor was the single employee responsible for the union's organizing drive at the employer's premises. She contacted the union and signed up fellow employees as union members. There is no evidence, however, to suggest that the employer became aware of the organizing drive until shortly after the application for certification had been filed on July 19, 1982. Moreover, there is no evidence to suggest that the employer was aware of the grievor's role in the union's drive for certification prior to his discharge on August 24, 1982. The Board must conclude from the undisputed evidence that the employer first learned about the grievor's role in the union through a letter dated August 27th, three days following her discharge. In this letter the employer was informed that the grievor would be one of the three persons representing the employees in negotiations for a collective agreement.

3. The incident giving rise to the grievor's discharge occurred on August 24, 1982. The grievor, a waitress, was assigned to a smoking section of the restaurant. She complains that on the evening of August 24th she was apportioned an unduly high percentage of the customers. As the evening progressed, she found the situation intolerable. As a result, he walked off the floor, left the restaurant and was subsequently discharged.

4. The respondent notes that it is not unusual for the smoking sections to attract more customers than the non-smoking sections. Moreover, the grievor was among the more experienced waitresses on the floor that evening. Under these circumstances, the respondent maintains it is not surprising that the grievor drew a somewhat larger share of the customers. It is the submission of the union, however, that the overloading of the grievor's section cannot be explained by these factors. The union asks the Board to conclude that in the absence of an adequate explanation the motivation for the grievor's treatment must have been anti-union *animus* contrary to the Act.

5. Ms. Godin testified that when she couldn't take anymore of what she considered to be an unfair overloading of her section of the restaurant, she left the floor, went to the locker room, changed her clothes and left. There is some contradiction in the evidence as to what was said in the locker room but the Board is prepared to accept Ms. Godin's testimony in this regard. She stated that she spoke to Mr. Jeff Gillies who is the assistant kitchen manager and told him to tell Ms. Raymonde Perreault, the assistant dining room manager and the person Ms. Godin viewed as responsible for overloading her section, to "fuck off". She stated that while she was in the washroom, Ms. Perreault came into the locker room to ask what was going on. Mr. Gillies told Ms. Perreault that Ms. Godin was leaving. A short while later Ms. Perreault came into the locker room again, this time to ask for the order slips relating to the tables Ms. Godin was waiting on at the time she left the floor. The grievor stated that neither Mr. Gillies nor Ms. Perreault indicated that if she left the restaurant that night she would be dismissed.

6. Mrs. Alberta Roy, the dining room manager, was not present at the time of the incident. After hearing about the situation from Ms. Perreault, however, she called Ms. Godin to inquire into what had happened. Ms. Godin apologized and stated that she wanted to come back to work. Ms. Roy told Ms. Godin she would phone back the next day to let her know if she should come in for her shift. The next morning, though, it was Mr. John Hare, the restaurant manager, who called Ms. Godin. He stated that he'd heard that she had walked off the floor the night before and asked her what had happened. Through their conversation Mr. Hare indicated that given the circumstances of her departure, it was his view that she had quit her job. He stated that he would not be allowing her to return.

7. Mr. Hare stated to the Board that he considered Ms. Godin's act of walking off the floor, leaving customers unattended and putting the restaurant in a difficult situation as an act of resignation. Ms. Perreault confirmed in her evidence that when Ms. Godin walked off the floor, her customers were left without coverage for a period of time. Moreover, the orders at Ms. Godin's tables had to be reconfirmed with the customers. With each remaining waitress taking an extra table and Ms. Perreault helping out, the situation was brought back in control. Mr. Hare spoke to Ms. Godin about the adverse effect that her conduct had on the customers and the potential problem for the restaurant's reputation. He then informed her that she was not welcome back. Mr. Hare asserted that the above noted considerations were the only factors that caused him to not allow Ms. Godin to return to work.

8. In a matter such as this section 89(5) of the Act places the onus of proof on the employer to show that the employer did not act contrary to the Act by refusing to

continue the employment of an employee. In *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board at paragraph 17 described the nature of this burden as follows:

What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof "that any employer ... did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.* [1974] O.L.R.B. 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons; and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

9. On the evidence before us, the Board is satisfied that Mr. Hare's stated basis for refusing to continue the employment of Ms. Godin reflects his entire reason for so doing. The Board accepts that Mr. Hare was upset by the fact that Ms. Godin left her customers unattended and concerned about the adverse effect that this could have on the restaurant's reputation. Even if the Board considered the action taken by Mr. Hare to be harsh, the Board could not conclude, on that basis alone, that the employer had contravened section 66(a) of the *Labour Relations Act*. There is no evidence to suggest that either Mr. Hare or Ms. Perreault either disliked the union or was, at the time of Ms. Godin's discharge, even aware of her role in the organization of the union. There is absolutely no basis upon which to infer that the employer's decision not to continue the employment of Ms. Godin was tainted by anti-union *animus* contrary to the Act.

10. Accordingly, for the reasons set out above, the Board dismisses the complaint.

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**1058-82-U International Ladies' Garment Workers' Union, Complainant,  
v. Third Dimension Manufacturing Limited, Respondent**

**Constitutional Law – Discharge for Union Activity – Practice and Procedure – Unfair Labour Practice – Grievor laid off – Employer motivated by grievor's potential to testify adversely in pending termination application – Whether reverse onus provision contrary to *Charter of Rights and Freedoms* – Board not deferring constitutionality issue for determination by courts – Setting out Board's approach in face of challenge based on *Charter***

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and C. A. Ballentine.

**APPEARANCES:** *B. Fishbein, T. Abrahams and D. Ubogi for the complainant; Philip J. Wolfenden and Milton Wallace for the respondent.*

**DECISION OF THE BOARD;** February 22, 1983

1. This is a complaint under section 89 of the *Labour Relations Act*. The grievor, Mr. Daniel Ubogi, maintains that he was dismissed by the respondent because of his union sympathy, contrary to the *Labour Relations Act*.

2. The respondent is a manufacturer of ladies clothing located in Toronto. The grievor was employed by the respondent from May of 1980, working as a cutter of blouses at the time of his termination. It is common ground that Mr. Ubogi was a good employee, both from the standpoint of discipline and the quality of his work. The respondent maintains that on August 11, 1982 he was laid off because of a lack of work and that, in the face of his lay-off, he quit his employment.

3. Some time before his termination the grievor had two separate encounters with members of management concerning the representation of the respondent's employees by the complainant trade union. Mr. Milton Wallace, president of the respondent, admitted in evidence that in April of 1982, at or about the time he received notice of the union's intention to bargain a renewal of its collective agreement, he approached the grievor and asked him to take steps to terminate the union's bargaining rights. During that conversation, which took place in the shipping area of the respondent's premises, Mr. Wallace told the grievor that he would be given any time necessary for organizing a petition of termination. He also told him that he would be paid for any lost time in attending to the filing and hearing of the application for termination before the Board.

4. According to Mr. Ubogi's account of the conversation Mr. Wallace stated that if he needed a lawyer he should come and see him. Mr. Wallace admitted that he may have said something about a lawyer, specifically that he suggested that Mr. Ubogi would need legal counsel, but that he did not undertake to pay for the cost of a lawyer. In our view that difference in their testimony is relatively immaterial. It is plain from the evidence before the Board that the respondent's president violated the *Labour Relations Act* by encouraging, and to some degree undertaking to subsidize, an employee application for the termination of the complainant's bargaining rights. It is

also plain from the evidence that Mr. Ubogi did not, at that time or at any subsequent time, accept or encourage Mr. Wallace's invitation.

5. The invitation was extended once again. During the month of May in 1982 Mr. Ubogi was approached by Sevil Pollak, Vice-President of the respondent. Ms. Pollak spoke with the grievor at his work station, saying that she had received a letter from the union giving notice to bargain. She commented that she did not see why the employees needed a union and asked him why he did not try to do something to get the union out. Mr. Ubogi then responded that he was sorry but that there was nothing he could do.

6. When negotiations subsequently commenced between the respondent and the union the grievor appeared as a member of the union's bargaining committee. No further approaches were made to him with respect to the union's bargaining rights. On August 10, 1982, the termination issue re-emerged. On that day a number of employees left their work place and came to the Board's offices at 400 University Avenue where they filed an application and petition for the termination of the complainant union's bargaining rights. The grievor did not accompany the employees or sign their petition. The next day, August 11, 1982, Mr. Ubogi's employment was terminated.

7. There is some conflict in the evidence as to what transpired with respect to the cessation of the grievor's employment. The unchallenged evidence establishes that the grievor was called into the office of his foreman at approximately 3:00 p.m. and was told that he would be laid off for two or three days. Another employee was told the same thing. Mr. Ubogi then went to Mr. Wallace's office to get further information about the lay-off, apparently his first.

8. According to Mr. Ubogi's account when he asked Mr. Wallace how long the lay-off would last he was told that it would be a matter of two, three or perhaps four weeks. He then told his employer if the lay-off was to be that long he wanted his U.I.C. papers. Mr. Wallace then stated that that would be no problem and together they walked to the office where the president of the respondent issued instructions that Mr. Ubogi's papers be prepared. When Mr. Ubogi returned the next day he was given a U.I.C. termination slip and all holiday pay owed to him by the respondent.

9. The evidence of Mr. Wallace is that when the grievor came to his office and stated that he wanted his U.I.C. papers he concluded that Mr. Ubogi was quitting. By his account his instructions to prepare Mr. Ubogi's documentation were based on that belief.

10. The evidence of Mr. Thomas Abrahams, Business Agent of the complainant, casts some doubt on the testimony of Mr. Wallace respecting his view of Mr. Ubogi's intentions. It appears that on Monday, August 23, 1982, Mr. Abrahams met with Mr. Wallace and raised the issue of Mr. Ubogi's lay-off, asking when he would be recalled. According to Mr. Abrahams' testimony, which went largely unchallenged, Mr. Wallace then said that Ubogi had come to get his papers and that he did not know whether he had quit or was laid off. He then told Abrahams that he would look into the matter further. The next conversation between Abrahams and Wallace on this subject occurred on August 27, 1982 over the telephone. At that time, according to Abrahams' evidence,

denied by Wallace only to the extent that he could not recall it, Mr. Wallace told the union representative that Mr. Ubogi could return to work on the 1st or 2nd of September. In fact, the grievor was not called back on those dates. When nothing came of Mr. Wallace's words the instant complaint was filed on September 2, 1982. It is plain that from that date, if not from August 23, 1982 the respondent was aware that Mr. Ubogi did not intend to quit and was actively seeking to return to work.

11. Notwithstanding these events on September 18, 1982, the respondent placed an advertisement in the Toronto Star for vacancies in the position of full-time cutters. Ubogi was not recalled even at that point. Counsel for the respondent submits that the failure to recall Ubogi at that time cannot prejudice the respondent's position in this complaint. He submits that the section 89 complaint being outstanding at that time, with some negotiations between the parties for the terms of Mr. Ubogi's reinstatement then being outstanding, there was no obligation to offer him the first vacancy. We have serious difficulty with that proposition. The mere fact that a complaint has been filed before the Board does not alter the obligations of the parties under the Act. The refusal to reinstate an employee when others are being hired may constitute a continuation of a violation of the Act which can be the subject of the Board's inquiry notwithstanding that a complaint was pending at the time.

12. The respondent could, without any cost or prejudice to itself, have offered the grievor the first available vacancy in its shop without admitting liability in the instant complaint or incurring any obligation to compensate the grievor. If, as the respondent maintains, Ubogi was an exemplary employee against whom it harboured no anti-union sentiment, the employer had every reason to offer him the first opportunity to resume his employment. This is particularly true where the failure to do so could compound the respondent's financial liability for retroactive compensation in the event that this complaint should succeed. No offer of reinstatement or of rehire was made to the grievor.

13. The employer cannot effectively place the grievor in a worse position to gain reinstatement merely on the basis that he filed a complaint with the Board. An employer's violation of the Act can be ongoing; the duty not to discharge becomes a duty to reinstate or, in other words, to cease to refuse employment to an employee who has been terminated contrary to the Act. To that extent a failure to offer re-instatement to an admittedly good employee when new employees are being hired can be admissible evidence going to an employer's overall motive. In the instant case new employees were hired after September 18, 1982, but the grievor was not, at a time when there could be little reason to maintain the belief that he had quit and no valid reason whatever to deny him employment.

14. The foregoing facts leave many questions unanswered. While Mr. Wallace's evidence is that department foremen are left considerable discretion in judging the need and length of a lay-off, no explanation was given why the grievor's supervisor, Mr. Russo, told him that his lay-off would be for two or three days while at the same time Mr. Wallace told him that it could be for as much as four weeks. No financial or sales figures were adduced to justify Mr. Wallace's projection, and it appears that in fact the other employee laid off the same time as the grievor was recalled within three days. Even after the grievor did everything possible to disabuse Mr. Wallace of any belief



that he had quit, no acceptable reason was advanced for the continued refusal to reinstate or rehire him even though vacancies were filled by new employees.

15. In our view, in trying to understand these events, the fact that an application for the termination of the union's bargaining rights was pending, and that the respondent on two occasions sought unlawfully to recruit the grievor in the commission of an unfair labour practice that would have rid the respondent of the union, are not neutral factors. The grievor was obviously in a position to give evidence that might be severely prejudicial to the application for termination. Placing an employee in the grievor's position on indefinite lay-off would obviously give him reason to consider whether his future re-employment would be more likely if he were willing to forget his past conversations with Mr. Wallace and Ms. Pollak about the union. On the totality of the evidence the Board is satisfied that the respondent intended to leave the grievor in that uncertain position for the duration of the termination application. We are satisfied, on the balance of probabilities, that that was the motive for his lay-off and for the failure to reinstate or rehire him.

16. In his argument counsel for the respondent submitted that his client was prejudiced in that the reverse onus provision of section 89(5) of the Act is contrary to the provisions of section 11(d) of the *Charter of Rights and Freedoms in the Canada Act*.

17. Section 89(5) of the *Labour Relations Act* provides as follows:

(5) On an inquiry by the Board into a complaint under subsection (4) that a person had been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' – organization did not act contrary to this Act lies upon the employer or employers' organization

18. Section 11(d) of the Charter provides that:

Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

19. Section 11(d) of the Charter is an application to the criminal law of the general legal principle that "he who avers must prove". The submission of the respondent, which was not extensively elaborated in argument, is that section 89(5) of the Act creates a reverse onus which is contrary to the rights guaranteed by section 11(d) of the *Canadian Charter of Rights and Freedom*. The objection is a novel one and raises two issues: firstly whether the objection is well-founded, and secondly, the approach which a tribunal like the Board should take when it is asked, in effect, to declare that a provision of its own statute is unconstitutional.

20. We deal with the second issue first. The *Charter of Rights and Freedom* establishes for Canadians rights which are of fundamental importance and which must

be respected at every level of the legal process. All who administer the law are necessarily governed by its requirements and protections. Policemen and prosecutors, for example, must be guided by the rights of a person subject to a criminal charge and arrest. The courts and tribunals like this Board are governed by the guarantee of fundamental justice enshrined in section 7 of the Act. In that sense this board must interpret and abide by the Act in its day-to-day proceedings, being ever mindful of the legal paramountcy of the Charter as reflected in the provisions of section 52(1) of the *Canada Act*:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

21. For many years the National Labour Relations Board has taken the position that it should decline to pass on a challenge to the constitutionality of any provision of the *National Labour Relations Act*. Its first reported comment in that regard appears to have been made in re *Rite Form Corset Co, Inc. and United Steelworkers of America C.I.O.* (1947) 75 NLRB 174, 21 LRRM 1011. In that case the Board was asked to declare, among other things, that sections 9(f) and (h) of the *National Labour Relations Act*, which barred hearings by the Board of representation cases brought by unions which failed to comply with certain registration and disclosure provisions under the Act, were unconstitutional. The Board applied the sections and dismissed the applications stating (at 21 LRRM 1012):

As an administrative agency of the Federal Government, it is inappropriate for the Board to pass upon questions regarding the constitutionality of Congressional enactments. Such questions will be left to the courts. In the absence of any court decision to the contrary, the Board assumes that the Act as amended does not violate any provision of the Constitution of the United States, as alleged by the petitioner.

(See also (1982) *Delta Airlines* 111 LRRM 1159, *Pet Inc.* 244 NLRB 96, (1979) 102 LRRM 1046, *Great Western Broadcasting Corp.* 150 NLRB 467, (1964) 58 LRRM 1019.

22. The approach of the N.L.R.B. does not appear to us to be compelling or appropriate in the context of the law of Canada. In our view the imperatives of section 52(1) of the *Canada Act* are inescapable; that cornerstone section imposes a duty on all bodies charged with the good faith administration of laws to insure that the laws which they apply and the procedures by which they are administered are not inconsistent with the provisions of the Constitution. Moreover in the past this Board, like other labour boards in Canada, has had a meaningful role to play in the framing and resolution of constitutional issues. In numbers of cases in the past the Board has been required to make determinations as to whether particular applications or complaints before it fall within the federal or provincial heads of jurisdiction under the *British North America Act*. In so doing it must inevitably examine both that statute and the judicial precedents which have interpreted its provisions.

23. A recent decision of the Supreme Court of Ontario, *Windsor Airline Limousine Services Ltd.*, (1980) 30 O.R. (2d) at 734-35 (Div. Ct.) has affirmed that when a

constitutional issue is raised before the Board it should not merely throw up its hands and pass the matter directly to the courts. The Court took the view that the legal process is better served if the Board makes the pertinent findings of fact and comments on the labour relations and constitutional ramifications of the facts as found, with appropriate reference to the authorities. The Board's approach, effectively endorsed by the Court, was stated as follows in its decision in *Windsor Airline Limousine Services Ltd.* [1980] OLRB Rep. Feb. 272 at 274:

When faced with a challenge to its constitutional jurisdiction the Board has a clear duty to consider and rule on the challenge, and in so doing to recite and analyze the facts as thoroughly as possible. Clear findings of fact, with some comment on the ramifications of the facts for industrial relations policy, will assist the courts in the event of a judicial review of the Board's determination. As the Board put in the *Dry Bulk Forwarders Ltd.* [1974] OLRB Rep. Sept. 629 at 632:

The Courts are the great equalizers in the application of constitutional law principles, but neither they nor the parties should be denied the viewpoints of the inferior tribunals – viewpoints based upon the *viva voce* evidence that comes before them. Only in this way can the courts meaningfully assess the facts upon which the constitutional law principles must be applied.

24. The fundamental approach to be followed in cases of this kind was touched upon by the Supreme Court of Canada in the *Nova Scotia Board of Censors v. McNeil* [1976] 2 S.C.R. 265. In that case a private citizen challenged legislation by which a provincial film censorship board purported to prohibit the showing of a film entitled "Last Tango in Paris". The preliminary issue of the individual's standing to bring an application for such a declaration found its way, over several years, through two levels of court reviews in Nova Scotia and ultimately, to the Supreme Court of Canada. The Court upheld the individual's right to challenge the legislation. As a practical result, after the expense of considerable time and money, with no determination on the merits of his original application, the individual was left only with the right to return to the court of first instance, for a decision subject to still further appeals, on the merits of his original application for a declaration that the legislation was *ultra vires* the Province.

25. In the face of that result the Supreme Court of Canada expressed the view that dealing with the issue of standing in the abstract, without any finding of fact or close analysis of the statute involved, is less than desirable both from the standpoint of the ability of an appellate court to resolve important issues of constitutional principle out of context, and from the standpoint of the successful party who may thereby be forced to trek through the trial and appeal process twice. Speaking for the Court at p. 267 Laskin, C.J.C. commented:

... The merits were not reached because of certain preliminary objections which were raised for prior determination. Of these the



most important one, and the only one meriting consideration by this Court, was the question of the respondent's *locus standi*, his standing or status to impeach the constitutional validity of the provincial statute.

In granting leave, this Court indicated that where, as here, there is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying and disputed question on standing.

26. In our view the foregoing passages point the way to be followed by this Board when forced with a challenge to its jurisdiction based on the Canadian *Charter of Rights and Freedoms*. In the months and years to come the Charter will be subjected to the refining process of Court review through a progression of individual cases in many branches of the law. This Board, like all tribunals, will be required to be aware of the judicial interpretation of the Charter's provisions and to respect and apply those interpretations in its day-to-day affairs. In our view the Board is no less required to interpret and apply the terms of the *Charter of Rights and Freedoms* merely because the process of judicial interpretation of that governing document is in its infant stages. On the contrary, for the reasons related above we are confirmed in the view that the process of the elaboration of the Charter in the Courts will be better served, as will the Board's duty to faithfully apply the Charter's provisions, if the Board strives to make determinations in jurisdictional challenges on constitutional grounds, whether relating to the traditional heads of federal and provincial power or to the *Canadian Charter of Rights and Freedoms*. The Board's determination will, of course, be subject to the review of the Court, whose task will hopefully be assisted by the Board's analysis.

27. We therefore turn to the merits of the challenge of section 89(5) of the Act by the respondent. Section 89 is the general section by which the Board is empowered to fashion a range of civil remedies to redress the unfair labour practices of employers, employees, unions and other individuals. Section 89 provides, in part:

89.-(1) The Board may authorize a labour relations officer to inquire into any complaint alleging a contravention of this Act.

(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include,

notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

28. It should be stressed that neither the Board nor the courts have ever viewed a complaint under section 89 of the Act as being penal or quasi-criminal. Section 96 makes specific provision for the prosecution of offenses under the Act. A prosecution arising out of an alleged offense under the Act can be taken only with the consent of the Board granted pursuant to an application under section 101(1) of the Act. Consent is granted only where a triable issue or *prima facie* case is established and where the Board is satisfied that the prosecution will "serve the interests of the bargaining relationship between the parties or generally advance the interests of collective bargaining in the Province". (*Fleck Manufacturing Company* [1978] OLRB Rep. July 615.) Any prosecution for an offense under the Act must be initiated by information pursuant to the *Provincial Offences Act* R.S.O. 1980, c. 400, s. 24 and heard by a provincial offences Court. Section 89 of the Act and the reverse onus provision have no application in those proceedings.

29. The remedial authority of the Board under section 89 is directed to very different purposes. Part of the thrust of the 1975 amendments to the *Labour Relations Act* was to provide greater scope for civil redress, as an alternative to criminal prosecutions, in the resolution of unfair labour practice complaints. The broad remedial authority given to the Board in section 89 represents a conscious policy choice to give the Board the jurisdiction to fashion the kinds of civil remedies that will best advance the purposes of the statute. Since the 1975 amendments a party seeking consent to prosecute has a substantial burden, given the Board's presumptive view that the remedies available under section 89 are, generally, more constructive than a criminal prosecution in the promotion of good industrial relations, (*A. A. S. Telecommunications Ltd.* [1976] OLRB Rep. Dec. 751 at 761).

30. With that purpose in mind the Board has consciously refrained from allowing its remedial orders to become in any way punitive. (*Radio Shack*, [1979] OLRB Rep. Dec. 1220). As the decision in *Radio Shack*, as confirmed by the Court, (Sub. nom. *Re Tandy Electronics Ltd. and United Steelworkers of America*, (1980) 30 O.R. (2d) (Div.

Ct.) made clear, any relief ordered by the Board on a finding of an unfair labour practice under section 89 of the Act must be compensatory and not punitive. As the Court observed at p. 47 (O.R.):

So long as the award of the board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board.

Section 89 of the Act has, therefore, been consistently viewed by the Board, with the approval of the courts, as remedial and not punitive legislation. The purely civil and remedial nature of the Board's jurisdiction under section 89 raises good reason to doubt whether the presumption of innocence which applies to the prosecution of offences under the *Charter of Rights and Freedoms* can have any bearing on unfair labour practice complaints under that section.

31. By introducing the reverse onus provision into section 89 of the *Labour Relations Act* in 1975 the Legislature imported into the Board's procedures a principle already well rooted in labour law. In arbitral jurisprudence the principle was well established that in discipline cases the onus is on the employer to prove, on the balance of probabilities, that the grieving employee was disciplined or discharged for just cause. (*International Nickel Company* (1968) 19 L.A.C. 397 (Schiff).) In this regard arbitral authority has followed the common law; it has for some time been the rule in actions for wrongful dismissal that once an employee has proved hiring and dismissal, the defendant employer has the burden of proving that the dismissal was for just cause (*Butler v CNR* [1940] 1 DLR 256 (Sask. C.A.); see also, generally McGlyne, *Unfair Dismissal Cases* (2nd ed.) (London 1979), Harris, *Wrongful Dismissal* (Toronto, 1978).)

32. Placing the onus on the employer, and requiring the employer to proceed first in the arbitration of discipline cases may be justified on the theoretical basis that in fact the employee has created just cause for discharge or discipline by conduct inconsistent with his contract of employment. On that basis the proof of just cause can be said to lie with the employer who, in effect, asserts a breach of the employee's contract. A more practical justification for the reverse onus rule is the simple fact that the employer is the party with complete knowledge of the grounds for an employee's discharge or discipline. Absent the most extensive written explanation for the company's action, a discharged employee would, at arbitration, be in the problematic position of having to disprove a negative. It has therefore long been accepted in labour arbitration that the employer, which has exclusive knowledge of the reasons for discipline or discharge, is better placed to satisfy any evidentiary onus that can apply in the arbitration of an ensuing grievance (*Massey Ferguson Industries Limited*, (1969) 20 L.A.C. 178 (Weatherill) at 179-80).

33. The same general principles apply to the reverse onus which comes into play under section 89(5) of the Act where it is alleged that an individual has been dealt with contrary to the provisions of the Act by his or her employer. Under that section the employer has the onus of establishing that it did not act contrary to the Act. It is not the function of the Board to decide whether there was just cause for discharge or



discipline, but to determine whether the employer applied some sanction to the employee because he or she supported a union or sought to exercise any other rights under the Act. (*Toronto Star*, [1971] OLRB Rep. Sept. 582; *Mount Forest Caskets Limited*, [1980] OLRB Rep. June 853).

34. The reasons for a discharge, discipline, layoff, transfer, demotion or any other such action are best known by the party that imposed it. Implicit in the requirement of a reverse onus is the realization that it would be procedurally unfair to require an employee to prove the motive for his discharge. The very question at issue, why an employee was discharged, disciplined or otherwise dealt with by his employer, is best answered by the party which made the decision. The Board has stated that to discharge the onus under section 89(5) the employer has to satisfy two requirements. Firstly it must bring forward all of the reasons which motivated its discharge of an employee and, secondly, it must establish that anti-union animus played no part in its reasons. As a matter of evidence the onus comes into play only when the evidence is evenly balanced, at which point it tips the scale in favour of the complainant (*The Barrie Examiner*, [1975] OLRB Rep. Oct. 745). As a practical matter the Board, like boards of arbitration, has ruled that generally the reverse onus is better applied by requiring the employer to proceed first in the hearing of a section 89 complaint (*I.C.B. Warehousing Division of Alar-Anson*, [1976] OLRB Rep. Oct. 621). The Board, with the endorsement of the Court, has found that the failure of an employer to call any evidence upon the hearing of a section 89 complaint results in the conclusion that the allegations made in the complaint must be taken as proved. (*Windsor Airline Limousine Services Ltd.*, (supra).)

35. Initial fears that the reverse onus might work a hardship on employer respondents and force them to litigate when the specific charges against them were unclear have not, in our experience, been borne out. Since its earliest decisions involving the reverse onus the Board has held complainants to strict standards of particularity in their allegations to avoid any prejudice, hardship or surprise to respondents who are required to discharge the reverse onus. Moreover in the arbitration of discharge cases the empirical evidence appears to demonstrate that at least to the extent of establishing cause for some discipline, employers are more successful than grievors, notwithstanding the reverse onus there applied. (See Adams, *Grievance Arbitration of Discharge Cases*, Industrial Relations Centre, Queen's University at Kingston, 1978, at pp. 42-3.)

36. The reverse onus provision in section 89(5) of the *Labour Relations Act* is both purposive and historically rooted. For the reasons canvassed above, it is consistent with the more efficient advancement of the policies of the Act, and is in keeping with the extensive experience of the civil courts in wrongful dismissal cases and boards of arbitration in discipline cases generally. Nor is it inconsistent with the general precepts of due process or natural justice in civil cases. The location of the burden of proof does not prevent either party in a complaint before the Board from being fully and fairly heard. In practical terms, as the Board's decision in *The Barrie Examiner* indicates, the reverse onus provision has a bearing only in that small minority of cases in which the evidence is so evenly balanced that no precise determination can be made on the balance of probabilities.

37. In our view, for all of the foregoing reasons, the provisions of section 89(5) of the Act do not contravene the presumption of innocence provisions of the *Charter of Rights and Freedoms*. That provision is expressly stated to apply to the prosecution of "offences", and is therefore intended to operate in the realm of criminal proceedings. Complaints under section 89 of the *Labour Relations Act* are civil and remedial, not criminal and penal, and that part of the Charter does not apply to them. We are likewise satisfied that section 89(5) is in keeping with established common law principles which can in no way be said to be contrary to the rules of natural justice or to the principles of fundamental justice preserved and protected by article 7 of the *Charter of Rights and Freedoms*.

38. It should be added that in the disposition of the instant complaint the Board has had no recourse to the burden of proof. This is not an instance in which the evidence is evenly balanced; the Board is satisfied that the evidence against the respondent is overwhelming and that it can dispose of this complaint without any recourse to the reverse onus.

39. For the foregoing reasons the Board found that the grievor, Daniel Ubogi, was discharged and denied reinstatement contrary to the provisions of section 66(a) of the Act. The Board was also satisfied that the respondent sought both through its solicitation of the grievor and through the discharge of Mr. Ubogi to unlawfully interfere with the administration of the complainant union contrary to section 64 of the Act. By a telegram dated December 13, 1982, the Board ordered that Mr. Ubogi be reinstated, forthwith with compensation for wages and benefits lost, with interest, and without loss of seniority. The respondent was further ordered to cease and desist from any effort to initiate, promote or otherwise encourage the termination of the complainant union's bargaining rights, or from any conduct which otherwise interferes with the rights of its employees or of their trade union under the Act. The respondent was further ordered to post copies of the attached notice marked "Appendix", duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive days. The respondent was ordered to take reasonable steps to insure that the said notices are not altered, defaced or covered by any other material.

40. The Board remains seized of this complaint to resolve any matter arising out of the interpretation of its order.

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Appendix  
The Labour Relations Act

# NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED.

THE BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY UNLAWFULLY TERMINATING AND REFUSING TO REINSTATE MR. DANIEL UBOGI. THE BOARD ALSO FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY ENCOURAGING MR. UBOGI TO START A PETITION TO TERMINATE THE UNION'S BARGAINING RIGHTS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THE FOLLOWING RIGHTS:

TO ORGANIZE THEMSELVES,

TO FORM, JOIN, AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION,

TO ACT TOGETHER FOR COLLECTIVE BARGAINING,

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS;

WE WILL NOT FIRE OR LAYOFF EMPLOYEES BECAUSE THEY HAVE JOINED THE UNION AND HAVE PARTICIPATED IN ITS LAWFUL ACTIVITIES,

WE WILL NOT ENCOURAGE EMPLOYEES TO INITIATE PETITIONS TO TERMINATE THE UNION'S BARGAINING RIGHTS,

WE WILL COMPLY WITH THE FOLLOWING DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD:

- 1) TO GIVE MR. UBOGI HIS JOB BACK IMMEDIATELY WITH COMPENSATION FOR WAGES AND BENEFITS LOST, WITH INTEREST, AND WITHOUT LOSS OF SENIORITY,
- 2) TO STOP ENCOURAGING EMPLOYEES TO TERMINATE THE UNION'S BARGAINING RIGHTS,
- 3) TO STOP DOING ANYTHING WHICH INTERFERES WITH THE RIGHTS OF OUR EMPLOYEES OR THE UNION UNDER THE LABOUR RELATIONS ACT.

THIRD DIMENSION MANUFACTURING LIMITED  
PER: (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

DATED this 13TH day of DECEMBER, 19 82.



**1803-82-R** Ontario Public Service Employees Union, Applicant, v. **The Board of Education for the City of Toronto**, Respondent, v. The Federation of Women Teachers Associations of Ontario, Intervener #1, v. Ontario Secondary School Teachers' Federation District 15, Intervener #2, v. Canadian Union of Public Employees, Intervener #3, v. Ontario Public School Teachers' Federation, Intervener #4 v. Group of Employees, Objectors

**Bargaining Unit - Practice and Procedure - Whether short-term and long-term occasional teachers having community of interest - Elementary and secondary school occasional teachers given separate units - Unique employment relationship of occasional teachers not causing Board to dispense with "30 day rule" in determining number of employees in unit**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members C. G. Bourne and B. L. Armstrong.

**APPEARANCES:** *Chris G. Paliare, Pauline R. Seville and Ivor Oram for the applicant; D. W. Brady, C. Wooding and R. Sprang for the respondent; Elizabeth J. Shilton Lennon for intervener #1; Maurice A. Green and David Clarke for intervener #2; no one appearing for intervener #3; Wm. Markle for intervener #4; Barry Edson, Donna M. Aberle and Elaine Lichtenberg for the objectors.*

**DECISION OF THE BOARD;** February 14, 1983

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* (also referred to in this decision as the "Act").
3. The applicant seeks bargaining rights for a unit comprised of "all occasional teachers employed in the elementary and secondary panels of the Board of Education for the City of Toronto, at Toronto, Ontario". Section 2 of the Act provides in part as follows:

"This Act does not apply,

• • •

(f) to a teacher as defined in the *School Boards and Teachers Collective Negotiations Act*, except as provided in that Act."

Section 1(m) of the *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c. 464 provides:

"In this Act,

• • •

‘teacher’ means a person,

(i) who holds a valid certificate of qualification as a teacher in an elementary or secondary school in Ontario,

(ii) who holds a letter of standing granted by the Minister under the *Education Act*,

(iii) in respect of whom the Minister has granted a letter of permission under the *Education Act*,

and who is employed by a board under a contract of employment as a teacher in the form of contract prescribed by the regulations under the *Education Act*, but does not include a supervisory officer as defined in the *Education Act*, an instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month”.

The making of a written “contract of employment” of the type referred to in that provision is a mandatory requirement in respect of every “full-time or part-time teacher who is employed by a board [of education] and who is not an occasional teacher”: see section 230 of the *Education Act*, R.S.O. 1980, c. 129. It is this statutory requirement which has given rise to the jargon by which teachers bound by such a contract are referred to as “contract” teachers and teachers not bound by such a contract are referred to as “non-contract” teachers.

4. The Board’s jurisdiction over the “occasional teachers” for whom the applicant seeks bargaining rights was not disputed by any of the parties. Having raised that matter with the parties and considered their submissions, the Board is satisfied that it has jurisdiction in this matter since the “occasional teachers” whom the applicant seeks to represent are not “contract” teachers. Thus, they are not “teachers” as defined in the *School Boards and Teachers Collective Negotiations Act*, and are not excluded from the coverage of the *Labour Relations Act* by section 2(f) (or any other provision) of the *Labour Relations Act*.

5. The respondent submits that the bargaining unit proposed by the applicant is not appropriate for collective bargaining. In lieu of that unit, the respondent proposes the following bargaining units:

1. All occasional teachers in the elementary panel employed by the respondent in the City of Toronto save and except all long term occasional teachers.

2. All occasional teachers in the secondary panel employed by the respondent in the City of Toronto save and except all long term occasional teachers.

The respondent also proposes the following clarity note to each bargaining unit:

1. An "occasional teacher" is as defined in *The Education Act*, R.S.O. 1980, c. 129, and amendments thereto.
2. A "long term occasional teacher" is a teacher employed to teach as a substitute for a permanent or probationary teacher who is absent for a period of twenty (20) or more consecutive instructional school days.

The definition of "occasional teacher" to which the proposed clarity note refers is contained in paragraph 31 of section 1(1) of the *Education Act*, which provides that "occasional teacher" means a teacher employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year".

6. Implicit in the respondent's bargaining unit proposals is the potential for two further units of occasional teachers, namely:

all long term occasional teachers in the elementary panel employed by the respondent in the City of Toronto, and

all long term occasional teachers in the secondary panel employed by the respondent in the City of Toronto.

Thus, in their oral submissions to the Board, counsel focused upon whether there should be one, two or four bargaining units in the present case.

7. At the hearing of this matter on February 1, 1983, the parties' respective representatives indicated that they were content to have the Board determine the appropriate bargaining unit(s) on the basis of their representations and submissions, along with the exhibits filed with the Board by counsel for the respondent (on the consent of the parties), without the necessity of any other evidence being adduced.

8. In support of his client's bargaining unit proposals, counsel for the respondent submitted that "long term occasionals" and "daily occasionals" (also referred to in this decision as "short term" occasionals) do not share a community of interest. It was his contention that whereas a short term occasional teacher is essentially looking after another teacher's programme during the latter's relatively brief period of absence, a long term occasional is, in effect, responsible for his (or her) own teaching programme, including lesson planning, and preparing report cards and tests. He also noted that long term occasionals have a better opportunity to familiarize themselves with the strengths and weaknesses of their students. There is also a difference in remuneration. All occasional teachers who have a university degree receive a fixed *per diem* rate when filling a short term vacancy, regardless of their experience or qualifications, and regardless of whether they are teaching at the elementary school or secondary school level. (There is also a separate elementary school *per diem* rate paid to occasionals who



do not have a degree, for short term work.) However, once an occasional teacher falls within the definition of a "long term occasional teacher" by being employed to teach as a substitute for a permanent or probationary teacher she is absent for a period of twenty or more consecutive instructional school days, he is paid "the grid rate", i.e., the salary rate which his experience and qualifications would entitle him to receive if he were a "contract teacher" covered by the respondent's elementary panel collective agreement or the respondent's secondary panel collective agreement (as the case may be).

9. Counsel for the respondent further noted that the twenty day cut-off point was not something invented by the respondent for purposes of this application. In support of that contention, he drew the Board's attention to Article 2.1.7.0.0 of the current collective agreement between the respondent and intervener #2, which, for purposes of determining the "salary step" to which a (contract) teacher's experience entitles him, provides that (as of September 1, 1975) "a Teacher who has taught for the [respondent] as a substitute for a Teacher for 20 consecutive instructional school days and who subsequently becomes employed under Contract with the [respondent] will be granted 1/10 of a year of Teaching Experience for each of such 20-day periods". That article also provides that the "Contract of a Teacher who has taught for the [respondent] as a substitute for a Teacher for 20 consecutive instructional school days immediately prior to entering into that Contract shall be deemed to have commenced on the initial day of the 20 consecutive instructional days." There is also a "general note" which follows a number of letters of understanding appended to that collective agreement, which provides: "It is the intention of the respondent to give surplus Teachers first consideration when hiring long term Occasional Teachers after meeting its obligations under Part VI [declining enrolment and surplus procedures] of the Agreement." The current collective agreement between the respondent and the "Branch Affiliates" represented by the Toronto Teachers' Federation (including intervener #4's "Toronto District") also contains a similar "deeming" provision (in Article 3.3.8.0.0). It was also undisputed that the "twenty or more" distinction is drawn not only the the seven Metropolitan Toronto boards of education but also by boards of education in many other parts of the Province. By way of example, counsel for the respondent filed with the Board a copy of a collective agreement between the applicant and the Brant County Board of Education that was negotiated after this Board (in File No. 1368-81-R) certified the applicant for the following bargaining unit which was agreed to by the parties to that application:

"all occasional teachers in the elementary panel employed by [the Brant County Board of Education] in the County of Brant, Ontario, save and except occasional teachers regularly employed for not more than twenty-four hours per week".

(Through negotiations, that bargaining unit was amended so as to include all occasional teachers in the elementary panel, by deleting the exclusion of "occasional teachers regularly employed for not more than twenty-four hours per week".) That collective agreement differentiates between "Casual Occasional Teachers" (who are "required to teach for a period that is less than twenty consecutive teaching days") and "Long Term Occasional Teachers" (who are "required to teach for a period of twenty or more consecutive teaching days") for purposes of remuneration and entitlement to certain

benefits such as bereavement leave, absences for examinations and graduations, jury duty pay and payment for professional activity days.

10. As a further indication of the extent to which the "twenty or more" distinction has been recognized within the Ontario educational context, counsel also filed with the Board excerpts from the June 1980 "Report of a Commission to Review the Collective Negotiation Process Between Teachers and School Boards" in which the Commission recommended that the *School Boards and Teachers Collective Negotiations Act* be amended to provide for inclusion of "occasional teachers" in the bargaining units for which "branch affiliates" of the "affiliates" defined in that Act hold bargaining rights. The Report (at page 47) described "occasional teachers" as "those who fill in for regular teachers for a maximum of twenty days in a school year". The Commission also recommends (at page 56 of its Report) that "there be several amended forms of teachers contracts" including a "Limited Term Teacher's Contract for qualified teachers engaged for a period of one month to twelve calendar months" and a "Supply Teacher's Letter of Appointment for qualified teachers engaged for a period of less than one month in any school year."

11. Counsel for the respondent also drew the Board's attention to the fact that the respondent further differentiates between short term and long term occasionals in that it deals specifically with the latter in the context of approving "staff changes". For example, the Minutes of the November 25, 1982 meeting of the Toronto Board of Education indicate that the respondent confirmed at that meeting approximately one hundred assignments of "occasional teachers ... on a temporary basis" to various specified schools. Assignments of occasional teachers for less than twenty consecutive instructional school days are not made subject to such approval. Moreover, unlike short term occasionals, long term occasional teachers sign a standard form letter which informs them that their "employment as an occasional teacher for a temporary period" at a specified school for a specified term has been approved by the respondent (subject to presentation of professional certificates and certified statements of experience). (The letter also advises them that they will be given one week's notice in the event that their employment as an occasional teacher is to be terminated prior to the specified termination date for reasons other than misconduct, disobedience or neglect of duty.) Respondent's counsel also advised the Board that a distinction is drawn between long term occasionals and short term occasionals in the respondent's budget. He urged the Board not to apply "industrial" criteria in determining the bargaining unit appropriateness in this educational context. He also asked the Board to concentrate upon the occasional teachers' community of interest while employed in a particular panel on a short term or a long term basis, and to give less weight to their community of interest while in an "unemployed" pool awaiting further assignments.

12. In support of his client's contention that occasional teachers employed in the respondent's elementary schools and occasional teachers employed in its secondary schools should be placed in separate bargaining units, counsel for the respondent noted that the provisions of the *School Board and Teachers Collective Negotiations Act*, recognize the distinction between secondary school teachers (who have for the most part traditionally been represented by branch affiliates of The Ontario Secondary School Teachers' Federation) and elementary school teachers (who have traditionally been represented by branch affiliates of the other four "affiliates" listed in section 1(a)

of that Act) for collective bargaining purposes. It was his contention that this dichotomy is based upon sound educational and labour relations considerations which also apply in the context of occasional teachers. In support of that contention, he argued that teaching in an elementary school is different than teaching in a secondary school in that elementary school teachers tend to be generalists responsible for educating the "whole child", while secondary school teachers tend to be specialists, responsible for instilling knowledge about a specific subject area. Counsel stressed the departmental organization of the respondent's secondary schools with its emphasis on department heads and other departmental positions of responsibility. He contrasted secondary schools, in which the department head provides "the first line of senior teacher supervision", with the elementary schools, in which "the senior teacher is the principal or the vice-principal". Counsel also informed the Board that in the secondary schools, it is the department head who telephones occasional teachers in order to fill a temporary vacancy, while in the elementary schools, it is the school secretary who makes such calls. Unlike the city-wide list of occasional teachers qualified to teach in the secondary schools, occasional teachers qualified to teach in the elementary schools are listed in twelve distinct geographic areas (with the exception of occasional teachers qualified to teach Special Education and French at the elementary school level, who are listed on a single, city-wide list). Of the 1,567 persons whom the respondent identifies as occasional teachers in its employ on the date of this application, about 340 have indicated to the respondent that they are qualified and available to teach in both elementary and secondary schools. However, the number of such persons who are actually offered and accept opportunities to teach in both panels appears to be quite limited. Counsel for the respondent also referred the Board to the provisions of the aforementioned "elementary" and "secondary" collective agreements which, he submitted, indicate different priorities.

13. In their interventions filed with the Board in this matter and in their oral submissions to the Board at the hearing, representatives of the various interveners submitted that any certificate(s) issued by the Board in this application should be made subject to the collective agreements in force between the various interveners and the respondent. While none of those representatives took any position concerning the issue of whether there should be more than one bargaining unit, some concern was expressed about possible "anomalies" such as "contract" teachers on leave of absence who work as "occasional teachers" during their leave, contract teachers who have been declared surplus and terminated but who may have rights (under a collective agreement) to be given first consideration by the respondent when it is hiring long term occasional teachers, and teachers who work as contract teachers on apart-time basis during the morning but work as occasional teachers in the afternoon.

14. In recognition of the bargaining rights presently held by other grade unions, counsel for the applicant agreed to amend the description of the bargaining unit requested by his client so as to exclude "persons covered by subsisting collective agreements" in accordance with the Board's normal practice in such matters. Although counsel for intervener #2 requested the Board to expressly make any certificate granted by it in this matter subject to the subsisting collective agreement in force between his client and the respondent "and the rights flowing from it", we are not prepared to accede to that request. It appears to us that the legitimate interests of each of the interveners will be adequately protected by the exclusion of "persons covered by



subsisting collective agreements”, and that the addition of the further phrase proposed by Mr. Green could add an unnecessary element of possible confusion with respect to the scope of that exclusion. It further appears to us that the rights, if any, of persons who fall within “anomalous” situations such as those described above, are matters to be determined in other proceedings such as arbitration, and not by this Board in the context of the present application.

15. Mr. Edson addressed the Board as counsel for Linda Campbell, one of the objectors. (In her statement of desire to make representations in opposition to this application, Ms. Campbell, who is included on the respondent’s list of employees in the proposed bargaining unit, identified herself as the President of the Metropolitan Association of Supply Teachers (Toronto Branch). There was no evidence before the Board concerning the status of that Association or concerning the number of occasional teachers whom it purports to represent.) Counsel for Ms. Campbell (whose status as an individual objector was not disputed by the applicant or any of the other parties) was opposed to the concept of separate bargaining units for short term and long term occasional teachers. He noted that it “depends largely on the luck of the draw” whether an occasional teacher is called to fill a short term or a long term vacancy. He also noted that there is a substantial degree of “movement back and forth” ; an occasional teacher may replace one teacher for a day or two and may then (or after several more short term assignments) teach for twenty or more days in another assignment, followed by other assignments of varying lengths. He submitted that in view of that interchange, it is important not to have the “twenty or more” split advocated by the respondent. Mr. Edson advised the Board that his client was taking no position concerning whether there should be separate elementary and secondary bargaining units. The two other individual objectors who entered appearances were provided with an opportunity to address the Board with respect to the issue of bargaining unit description but declined to do so.

16. In opposing the respondent’s request for separate bargaining units for long term and short term occasional teachers, counsel for the applicant noted that while the aforementioned Brant County Board of Education collective agreement distinguishes between those two groups for certain purposes, it nevertheless includes them both in a single bargaining unit. He further submitted that, in reality, there is not one distinct group of “daily” occasionals and a separate group of “long term” occasionals, but rather a “spectrum” ranging from single day assignments to assignments for a full school year minus one day, with each occasional teacher fitting somewhere on the spectrum at any given moment of time. He also submitted that the activities attributed exclusively to long term occasionals by counsel for the respondent, such as planning lessons and administering tests, do not “magically” begin to be performed by an occasional after nineteen days in a particular classroom, but rather begin to be performed after the first few days, and gradually expand as the absence continues. Counsel emphasized the “luck of the draw” aspect which determines whether an occasional teacher will, at any particular instant, be replacing a contract teacher who is absent for a period of twenty or more consecutive instructional school days, be replacing a teacher for a shorter period, or be at home awaiting a call for an assignment. He noted that an occasional teacher who completes a long term assignment does not necessarily receive another long term assignment; depending upon various contingencies such as the types of absences occurring among contract teachers, the occasional teacher may receive

another long term assignment or may instead receive one or more short term assignments of varying lengths, or may have a period of unemployment. He also observed that an assignment to replace a contract teacher who has taken ill may commence as a relatively short assignment, but may become more prolonged if the contract teacher does not recover as quickly as expected, or if it turns out that the illness is more serious than originally anticipated. Counsel further submitted that the excessive fragmentation which would result from the bargaining unit configuration proposed by the respondent would be undesirable and would not serve any valid labour relations purpose. He noted that a substantial number of the occasional teachers affected by this application are qualified to teach in both panels. He also relied on the fact that there is some interchange of occasional teachers between the respondent's elementary schools and its secondary schools. Moreover, he submitted that the nature of the work performed by occasionals in the elementary schools and the secondary schools is identical (namely, replacing an absent teacher), as are the requisite teaching skills. With respect to centralized personnel functions, he noted that all occasional teachers receive a computerized paycheque from the respondent's head office, and that a single paycheque is issued to cover work performed by an occasional teacher during a pay period, regardless of whether that work was performed in the elementary panel, the secondary panel, or both. Counsel further noted that the same standard form letter is used by the respondent to confirm long term occasional assignments in the elementary panel and the secondary panel.

17. Counsel for the applicant submitted that the creation of four bargaining units in this context would create organizational difficulties for a union seeking to organize occasional teachers, as organizers would have no way of knowing with any degree of certainty which occasionals to approach to organize a particular bargaining unit. He also submitted that the existence of four separate bargaining units could create unnecessary difficulties in respect of seniority rights, and urged the Board to take into account the desires of the employees as evidenced by their support for the applicant and the single bargaining unit which it seeks. It was also his position that the Matthews Commission Report does not assist the Board in resolving the issues before it, since the recommendations contained in the portion of the Report to which counsel for the respondent referred the Board have not been implemented by the legislature.

18. The power and obligation to determine "the unit of employees that is appropriate for collective bargaining" is conferred on the Board by section 6(1) of the Act. In exercising its discretion under that provision, the Board takes into account a variety of labour relations policy considerations and statutory objectives. See, for example, *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, in which the Board wrote:

"7. The Board is given a broad discretion under section 6(1) of the Act to determine the appropriate bargaining unit in all certification applications brought before it. The Board's determination in this regard establishes the constituency within which a trade union must demonstrate majority support in order to become certified and, in addition, sets the initial parameters within which bargaining will take place if certification is granted. The establishment of the constituency is of direct concern to the parties at the time of

certification in that this decision is often determinative of whether a union has support within the bargaining unit sufficient to be certified. Trade unions generally find it easier to organize a homogeneous, centralized group of employees, and, therefore, will often argue for a narrowly defined unit. Employers, recognizing that a union will have greater difficulty organizing on a wider basis, and recognizing further that it may be administratively easier to bargain on a broader basis, often take the opposite track. (See re *McDonald's Restaurants of Canada Limited*, [1974] OLRB Rep. Oct. 755, *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7, *Commonwealth Holiday Inns of Canada Ltd.*, [1970] OLRB Rep. Oct. 749 and *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330). However, where the union has sufficient support to warrant certification for a broader constituency it will argue for a broader unit in the hope of augmenting the strength from which it will seek to bargain. In these circumstances employers will be predisposed to seek a narrowing of the Union's bargaining rights. (See, *Goodyear Service Stores* 65 CLLC 16,018, *Cybermedix Ltd.*, [1974] OLRB Rep. Aug. 743 and *Adams Furniture Co. Ltd.*, [1975] OLRB Rep. June 491). One case is especially illustrative of the pragmatic considerations which govern the parties in their approach to bargaining unit determinations. In *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293, the union, which was seeking a pre-hearing vote, asked for a single plant unit while the respondent asked for a unit encompassing both its plants within the municipality. Before entertaining submissions with respect to the bargaining unit the Board conducted the pre-hearing vote but segregated the ballots from each plant. If the union failed to win a sufficient majority in the larger plant the application would fail and so the ballots cast by employees at the larger plant were counted. When it became known that the ballots cast by these employees gave the union a sufficiently wide majority that it was assured of obtaining bargaining rights for both plants, regardless of how the employees at the smaller plant voted, the parties reversed their positions with respect to the scope of the appropriate bargaining unit.

8. Although the Board must be sensitive to the impact of its bargaining unit determinations upon the ability of trade unions to organize, there are other factors which must also be taken into account. The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and viable bargaining structures. In determining the appropriate bargaining unit the Board does not give effect to one of these aims to the exclusion of the others. Rather, the task which falls to the Board in the exercise of its discretion under section 6(1) of the Act requires a balancing of these statutory objectives in the circumstances of each case..."



19. It is the Board's normal practice (in non-construction industry cases) to circumscribe the geographic scope of a bargaining unit by reference to the municipal boundary within which the employer operates. Where, as in the present case, the employer operates at two or more locations within a municipality, the Board's general practice is to describe a separate bargaining unit for each location unless the integrated nature of the operations or the community of interest of the employees at the different locations is such as to justify grouping the employees at the various locations into a single bargaining unit (see *Town of Meaford*, [1980] OLRB Rep. Nov. 1611, at paragraph 4). The Board generally determines the appropriateness of a unit which includes employees at more than one of the employer's locations in a single municipality by considering four fundamental criteria: (1) community of interest of the employees, (2) centralization of managerial authority, (3) economic factors, and (4) source of the work (see, for example, *Magna International Inc.*, [1981] OLRB Rep. Sept., 1260; *K Mart Canada Limited*, *supra*; and the leading case of *Usarco Ltd.*, [1967] OLRB Rep. Sept. 526). The criterion of community of interest has been further subdivided to include the nature of the work performed, the conditions of employment, the skills of employees, administration, geographic circumstances and interdependence. However, as noted by the Board in *Town of Meaford*, *supra*, in certain situations the Board has concluded that its general practice as set forth above should not be followed, since to do so would result in the creation of a number of artificially small bargaining units and unduly fragmented bargaining structures. Thus, for example, when dealing with municipalities as employers, the Board generally issues certificates for separate units of office staff and non-office staff on a municipal wide basis notwithstanding the fact that municipal employees may work at or out of a number of different locations (see *The Corporation of the Town of Orangeville*, [1981] OLRB Rep. Dec. 1817; *The Corporation of the Township of Valley East*, [1970] OLRB Rep. Jan. 1213; and *The Corporation of the Township of Markham*, [1969] OLRB Rep. Aug 592.) Similarly, employees working at various locations for the same county or regional school board have been included in the same bargaining unit (see *The Cochrane-Iroquois Falls Board of Education*, [1961] OLRB Rep. June 368). There is an implicit recognition of the validity of that approach in each of the bargaining unit descriptions proposed by the various parties to the present application. None of the parties contends that there should be a separate bargaining unit for each of the many schools operated by the respondent. Rather, the parameters of the dispute are confined to whether all of the occasional teachers who teach at any of the respondent's schools should be included in a common bargaining unit, or whether they should be subdivided on the basis of whether they teach in the respondent's elementary schools or its secondary schools (and further subdivided on the basis of the length of absence of the contract teacher whom they are replacing).

20. In recognition of the fact that employees who work substantially fewer hours than full-time employees do not generally share a community of interest with the latter group, the Board has generally excluded part-time employees from full-time bargaining units and placed them in a separate unit at the request of the union or the employer (see *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713, and *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330, for a discussion of the policy considerations which underlie that approach). However, the practice of the Board has been against making distinctions between employees based upon the (actual or probable) duration of their employment with an employer (with the exception of

“seasonal” employees in certain industries such as the canning industry and the tobacco industry). Thus, the Board has generally declined to distinguish between permanent and temporary (or “casual”) employees, and has generally included them in a common bargaining unit (see, for example, *Filkon Food Services*, [1981] OLRB Rep. Dec. 1771, application for reconsideration dismissed, [1981] OLRB Rep. Dec. 1771; *Board of Education for the Borough of Scarborough*, *supra*; and *Spramotor Ltd.*, [1976] OLRB Rep. May 215). Similarly, we are not persuaded in the context of the instant case that we should distinguish between “long term” and “daily” occasional teachers for purposes of bargaining unit description. The occasional teachers who fill absences of both durations are drawn from the same pool (or pools). Thus, there is a substantial amount of interchange between the two. Indeed, it may be impossible to determine at the time an occasional teacher accepts a call to substitute for an absent contract teacher whether the absence will be short term or long term. Placing such teachers in separate bargaining units might well create unnecessary difficulties concerning such matters as seniority and access to employment opportunities. Indeed, it could create difficulties somewhat akin to “jurisdictional disputes”, among occasional teachers who presently appear to share relatively unimpeded access to long term and short term employment opportunities with the respondent. The respondent’s organized work force is already split into sixteen bargaining units, including the aforementioned units of elementary (contract) teachers and secondary (contract) teachers (plus several other groups of employees represented by uncertified associations). To add four more bargaining units to that already large group would be to give the Board’s approval to what can only be described as an undue proliferation of bargaining units. The Board’s legitimate concern about undue fragmentation of an employer’s work force is well established in its jurisprudence (see, for example, *The Board of Education for the City of North York*, [1982] OLRB Rep. June 918; *Charterways Transportation Limited*, [1982] OLRB Rep. May 659; and *Town of Meaford*, *supra*.) Having regard to the submissions of the parties and the Board’s bargaining unit jurisprudence, we are of the view that the degree of fragmentation sought by the respondent through bifurcation of occasional teachers into short term and long term groups for purposes of collective bargaining would not be conducive to stable labour relations and is not warranted by the facts. If the parties find it necessary or desirable to continue to distinguish between long term and short term occasional teacher assignments for purposes of remuneration or other terms and conditions of employment, such distinctions can readily be incorporated into a single collective agreement as has been done in the aforementioned collective agreement between the applicant and the Brant County Board of Education.

21. While similar considerations provide considerable support for the applicant’s contention that there should be a single bargaining unit for all of the respondent’s occasional teachers, we are of the view that other relevant factors are present which make separate elementary and secondary panel bargaining units appropriate in the circumstances of this case. The historical dichotomy between elementary school teachers and secondary school teachers is reflected in the special legislation which governs collective negotiations between boards of education and “contract” teachers (i.e., the *School Boards and Teachers Collective Negotiations Act*). Their separate communities of interest also find expression in their distinct bargaining priorities, as reflected in the somewhat diverse provisions contained in the collective agreements between the respondents and the respective branch affiliates who represent the respondent’s elementary and secondary panel (contract) teachers. The provisions of



those agreements mirror some of the distinctions between secondary schools, with their emphasis upon departmentalized, subject orientation with the concomitant emphasis upon positions of responsibility within the various departments, and elementary schools with their disparate emphases as described by counsel for the respondent (and set forth earlier in this decision). Defining separate bargaining units for the respondent's elementary and secondary panel occasional teachers is consistent with the Board's practice of describing bargaining units of part-time employees (who are somewhat analogous to the employees affected by this application) in a fashion which mirrors the description of their full-time counterparts. Although some of the respondent's occasional teachers are qualified to teach not only some grades at the elementary school level, but also some grades at the secondary school level, it appears that the actual interchange of occasional teachers between the two panels is quite limited, and could, in any event, be accommodated by appropriate collective agreement language within the context of separate bargaining units. Moreover, the fact that the overwhelming majority of the respondent's occasional teachers are qualified to teach in only one of the two panels underlines the fact that the qualifications required for teaching various subjects at the secondary school level differ from those required for teaching at the elementary school level (see Regulations 262 and 269 (as amended) made under the *Education Act*). Those differences are also reflected to some extent in the lower *per diem* rate which is paid to short term occasional teachers who teach in the elementary panel without a university degree. As noted above, remuneration paid to long term occasional teachers also varies between the two panels, since it is based upon the "grid" rates set forth in the respondent's aforementioned respective elementary and secondary panel collective agreements. It is also appropriate to note that the creation of separate elementary and secondary panel bargaining units for occasional teachers would not tend to impede trade union organizational activities. Indeed, it might well facilitate such activities by permitting a trade union to concentrate its initial organizational efforts on a single panel.

22. For the foregoing reasons, the Board, in the exercise of its discretion under section 6(1) of the Act, finds that all occasional teachers employed by the respondent in its elementary panel in the City of Toronto, save and except persons covered by subsisting collective agreements, constitute a unit of employees of the respondent appropriate for collective bargaining. The Board further finds that all occasional teachers employed by the respondent in its secondary panel in the City of Toronto, save and except persons covered by subsisting collective agreements, constitute a unit of employees of the respondent appropriate for collective bargaining. For the purposes of clarity, the Board notes that "occasional teacher" means a teacher employed as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year, and does not include any teacher who is employed under a contract of employment in the form prescribed by the regulations under the *Education Act*.

23. The Board also heard the submissions of the parties concerning the approach which should be applied in determining the number of employees in the bargaining units at the time this application was made. The Board is charged with the responsibility of making that determination under section 7(1) of the Act, which provides:



"Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j)."

In *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840, the Board described its general practice (in applications for certification other than those filed under the "Construction Industry" provisions of the Act) with respect to determining the number of employees in a bargaining unit at the time the application was made (sometimes referred to as the "unit time") as follows:

"14. Although the unit time is determined by the provisions of section 7(1), nothing is said in that section or elsewhere in the Act concerning the method or criteria to be used by the Board in ascertaining the number of employees in the bargaining units at the material time. The determination as to whether a person is or is not to be numbered as an employee on the date of application is, therefore, left entirely to the discretion of the Board. To ensure consistency and order in its proceedings and with a view to the purely practical difficulties involved, the Board has adopted certain practices and rules of thumb applicable to the various situations which commonly arise in the employer-employee relationships.

15. As an assistance to the Board in arriving at a decision with respect to the number of persons in the bargaining unit, the employer is asked to file with the Board schedules listing its employees. The schedules form part of the reply required under section 7 of the Board's Rules of Procedure....

16. It is convenient to deal with the schedules now in reverse order. The rule of thumb applicable to Schedule "D" is that the Board, at the hearing, determines if the persons named thereon have worked within the month immediately preceding the date of application and have either returned to work within the month immediately following the date of application or are expected to so do. If these conditions prevail the employee concerned is considered by the Board to be an employee for the purpose of the unit count. If all are not fulfilled he is not numbered in the unit count.

17. Where an employee is listed on Schedule "C", he is found to be an employee for the purpose of the unit count if he worked at any time during the month immediately preceding the date of application and is to be recalled or has been recalled within the month immediately following the date of the application. Again, unless both conditions are met, such a person is not counted in the unit (*Bertrand & Frere Construction Co. Limited Case*, File No. 10347-65-R)...."

24. Thus, to be included as an employee in the bargaining unit for the purposes of the count, a person who was not at work on the date of the application must generally have been at work at some time during the one month period prior to the application date and have returned to work (or have been expected to return to work) within the one month period following the application date. (See also *Brewers Nursing Home*, [1981] OLRB Rep. July 852; *Irwin Toy Limited*, [1970] OLRB Rep. Dec. 912; *Keynorth Limited*, [1970] OLRB Rep. July 477; *Mobile Cartage and Distributors Ltd.*, [1968] OLRB Rep. Nov. 814; and *West Elgin District High School Board*, [1968] OLRB Rep. July 379.) This longstanding practice of the Board enables the parties to ascertain in advance of the hearing the persons who will be included for purposes of the count (see *Sydenham District Hospital*, [1967] OLRB Rep. May 135). A further reason for the existence of the practice is that it tends to exclude from the count persons who have not been at work during the trade union's organizing campaign and have not had an opportunity to express their support for or opposition to the trade union (see *Bertrand & Frere Construction Co. Limited*, [1965] OLRB Rep. July 292). See also *Sherman Sand and Gravel Ltd.*, [1978] OLRB Rep. May 460, in which the Board wrote (at paragraph 24):

“... [the thirty day] rule applies generally to all applications from outside the construction industry. In order to meet the requirements of this rule an employee must be at work both some time in the period thirty days prior to the date of the filing of the application and be at work, or expected to be at work, some time in the period thirty days after the date of application. These requirements take into account two concerns – that union and employers be able to identify the constituency of employees that will be used by the Board when assessing the degree of membership support enjoyed by an applicant; that some employees who are not at work at the date of the application may still have a sufficiently substantial employment attachment to justify inclusion in the employee constituency and a voice in the selection of the bargaining agent. The application of this rule results in what the Board considers to be the best balance between these two competing concerns. A heavy onus, therefore, rests upon any party seeking an exemption from this rule.”

(In that case, which involved an application in respect of certain “dependent contractors”, the Board declined to deviate from the thirty day rule.)

25. Counsel for the respondent and counsel for Ms. Campbell submitted that the Board should not apply its “thirty day rule” in the present case. It was their position that everyone on the list of occasional teachers filed with the Board by the respondent should be included for purposes of the count regardless of whether or not they had actually taught on the date of the application (December 17, 1982) or within a month before and after that date. Counsel explained that the respondent's lists of occasional teachers are updated annually by sending out cards in the spring to all of the occasional teachers on those lists, with a request that they return to the respondent by September a portion of the (perforated) card if they wish to continue to be on a list from which the respondent fills its needs for occasional teachers. Further names are also added to those

lists from time to time when qualified newcomers advise the respondent of their interest in working as occasional teachers. Thus, the list filed with the Board contains not only the names of persons who have worked for the respondent as occasional teachers at some time in the past, but also the names of persons who have merely applied for such work but have not as yet received any occasional teaching assignments from the respondent. In the alternative, counsel submitted that any occasional teacher who has taught for the respondent at any time on or before the date of this application during the 1982-83 academic year should be included as an employee for purposes of the count in this application so as not to "disenfranchise" any of the respondent's occasional teachers. In support of the respondent's position, counsel for Ms. Campbell noted that occasional teachers have a "fluid" employment relationship with "no guarantees of hours or days per week".

26. Counsel for the applicant, on the other hand, submitted that the Board should not deviate from its normal practice in determining the number of employees in the bargaining unit at the time of the application. He noted that the list filed by the respondent would include persons who, after sending in cards to have their names retained on the list, had become unable or unwilling to accept occasional teaching assignments. He further noted that it contains the names of persons who have applied for work as occasional teachers but have not yet been hired by the respondent to perform any such work. He questioned how a union seeking to organize such persons could possibly know which individuals to approach in view of the non-availability of the respondent's list, and in view of the fact that some of the persons in question would not have been working in any of the respondent's schools at any time during the applicant's organizing campaign so as to alert the organizers as to their existence. Counsel emphasized the relative certainty which the thirty day rule provides for all concerned parties. He also submitted that it is legitimate to apply that rule in the present context since there is a substantial group of occasional teachers who work for the respondent on a fairly regular basis.

27. Board practices such as the "seven week rule" (described in *Westgate Nursing Home Inc.*, [1981] OLRB Rep. April 503), and the "thirty day rule" described above, are guidelines, not "hard and fast" rules. However, since such guidelines are known, accepted and relied on by unions and employers alike, there is a substantial onus on any party requesting the Board to depart from such practices (see *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116, and *Sherman Sand and Gravel Ltd.*, *supra*). In the circumstances of the instant case, the Board does not find it appropriate to depart from its normal practice of applying the thirty day rule. Although the employment pattern for at least some of the respondent's occasional teachers is more sporadic than that of other persons employed by the respondent such as its "contract" teachers, we are nevertheless of the view that, in the context of the present case, the thirty day rule provides an appropriate balance between the legitimate interest of employees (not at work on the date of the application but nevertheless having a substantial employment nexus with the respondent) in having a voice in the selection or rejection of the applicant as bargaining agent, and the legitimate interest of the applicant and the other parties in knowing with a reasonable degree of certainty which persons will be included by the Board as employees for purposes of the count. The alternative approaches advocated by Mr. Brady and Mr. Edson would include as employees for purposes of the count a number of persons with little or no connection with the respondent's active



work force of occasional teachers. Such persons would not have been identifiable by organizers seeking to contact "bargaining unit" employees in an effort to persuade them to join the applicant and support its certification. Similarly, they could not have been identified or contacted by objectors wishing to organize opposition to this application. Finally, it may be noted that any potential difficulty that might have arisen in applying the second branch of the thirty day rule in the context of this application has been eliminated by the fact that more than thirty days have now passed since the date of the application. Thus, the respondent is in a position to specify with complete precision the occasional teachers who were not at work on December 17, 1982, but who were at work at some time within 30 days thereafter.

28. For the foregoing reasons, the Board will apply its normal thirty day rule in determining the number of employees in the bargaining units at the time the application was made. Since the aforementioned list of employees filed with the Board by the respondent does not comply with the Board's requirements and does not include some of the information necessary for the Board to apply the thirty day rule, the Board hereby directs the respondent to file with the Board forthwith a separate list of employees for each of the two bargaining units (found to be appropriate for collective bargaining earlier in this decision), including (in respect of each such list) separate schedules of employees at work on the date of the application and employees not at work on the date of the application. The latter schedules are to specify (for each person included on that schedule) the last day worked, reason for absence and actual date of return to work (if any).

29. The matter is referred to the Registrar to be scheduled for continuation of hearing.

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**1913-82-R Tremways Drivers Association, Applicant, v. Tremways (1982) Limited, Respondent**

**Bargaining Unit – Dependent Contractor – Employee – Economic dependence of persons admitted – Whether pre-requisite of obligation to perform duties satisfied – Single employee driver performing same work as dependent contractors sought to be included in same unit – Board directing two votes to ascertain wishes of dependent contractors and employee as to inclusion in mixed unit**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members J. A. Ronson and S. Cooke.

**APPEARANCES:** *T. J. Flaherty, Jim Machen, Don Campbell, Bill Fish and Alan Speers for the applicant; Robert J. Goodman and Lou Burley for the respondent.*

**DECISION OF THE BOARD;** February 28, 1983

1. This is an application for certification.

2. In a letter dated January 13, 1983 the Registrar advised the applicant that it appeared from a check of the Board's files that the applicant had not proven its status as a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The applicant was further advised that it must be prepared at the hearing to satisfy the Board that it is a trade union within the meaning of section (1)(1)(p) of the Act. At the hearing evidence was heard with respect to the formation of the applicant organization. The Board hereby confirms the finding made orally at the hearing that it is satisfied that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The parties reached a partial agreement with respect to the description of an appropriate bargaining units in this matter. The applicant seeks bargaining rights for a group which it maintains are dependent contractor truck drivers and for a single employee truck driver of the respondent. The respondent, without prejudice to its position that those referred to by the applicant as dependent contractors are in fact independent contractors, takes the position that the employee truck driver should not be included in a bargaining unit of dependent contractors. With the exception of the disagreement with respect to the inclusion of the employee truck driver in the bargaining unit, the parties are agreed that all dependent contractors engaged as truck drivers working at or out of Guelph, Ontario, save and except dispatchers, persons above the rank of dispatcher and office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. In addition to the dispute between the parties as to whether the bargaining unit description set out above should be amended to include the employee truck driver, the parties are also in dispute as to who falls within the bargaining unit description to which they have agreed. The applicant maintains that all of those who drive their own vehicles for the company and whose names appear on Schedule "A" as contractors are in fact dependent contractors who are employees within the meaning of the Act. The respondent, on the other hand, takes the position that these contractors are independent

contractors and therefore, are not employees within the meaning of the Act who would fall within the bargaining unit.

5. A dependent contractor is defined in section 1(1)(h) of the Act as follows:

“dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

Under section 1(1)(i) of the Act an “employee” includes a dependent contractor.

6. The company operates an over-the-road haulage service out of Guelph. The company utilizes the services of 8 drivers who own their own tractors and 1 driver who does not. These drivers are assigned by the company dispatcher to pick up loads in the Guelph area and to deliver these loads to various destinations. The owner/operator driver is free to determine the route he uses. The owner/operator drivers are responsible for all expenses incurred in the operation of their tractors and are paid a percentage of the tariff charged by the respondent to the customers. These drivers are paid a draw of \$150.00 a week against their earnings from deliveries made during the week. The respondent makes no deductions from the monies paid for Canada Pension Plan, Unemployment Insurance premium or Income Tax. In the event the customer does not pay Tremways, the driver is not paid for the delivery. All of the income of these persons is derived from Tremways.

7. The eight persons whose names appear on Schedule “A” and who own their own tractors operate under the company’s PCV licences. It is estimated that they spend five to six hours per day hauling for the company. Their tractors are used exclusively in making deliveries for the company. The company obtains the customers, sets the rates and assigns the contracts to be handled. The tractors owned by the disputed drivers are painted in company colours and the company name appears on these tractors. The drivers are expected to be at the company’s yard on a daily basis and to notify the company in case of absence.

8. The company has recently had reason to take back the PCV licences of three drivers who refused to take loads which were assigned to them. These drivers were individually asked to transport a load to Ottawa and refused. The day following the refusal the company asked for its PCV plates back. The company acknowledged that the effect of its action in this regard put the affected drivers on notice that they would no longer be used by the company.

9. Having regard to the facts as set out above, it is not surprising that the respondent does not dispute that the persons whose status is in dispute are in a position of economic dependence on the respondent company within the meaning of section 1(1)(h) of the Act. The respondent takes the position, however, that these persons are



not under an obligation to perform duties for the respondent within the meaning of section 1(1)(h) of the Act and therefore, are not dependent contractors within the meaning of the Act. The respondent argues that under the definition of dependent contractor set out in section 1(1)(h), the persons whose status is in dispute must be both in a position of economic dependence *and* under an obligation to perform duties for the respondent in order to be dependent contractors within the meaning of the Act.

10. The Board dealt with the interrelationship between the various components of the statutory definition of "dependent contractor" in *Adbo Contracting Company Ltd.* [1977] OLRB Rep. Apr. 197. The Board analyzed the definition as follows:

25. The shift of emphasis is readily apparent from a reading of the definition of dependent contractor. Clearly a person need not be employed under a contract of employment to be considered as a dependent contractor, and provision of tool, vehicles, equipment, machinery is no longer a major consideration. Contractual form and the ownership of tools are no longer essential considerations. The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of business relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.

26. Economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. Mere economic vulnerability, however, is not a sufficient basis for a finding that a person is a dependent contractor, since this is a condition that may be experienced by the true entrepreneur, just as much as the individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker.

27. The first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. *In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be "under an obligation to perform duties for that person" roughly analogous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not result in the identification of a particular contractual obligation since a business relationship may exist, and continue, in the absence of any particular contractual obligation. The Board, therefore, need not confine itself to this very narrow issue but may deal with the wider issue of the nature of the business relationship.*

(Emphasis added)

11. When we look beyond the economic dependence which is conceded in this case, we discover that the persons whose status is in dispute are under an obligation to perform duties for the respondent roughly analogous to that of an employee. Although there is no contractual obligation the statutory definition does not require one. However, in this case the respondent controls the source of and assigns the work. The disputed persons and their tractors have been integrated into the respondent's business. The integration of the equipment owned by these persons is evidenced by the use of the respondent's PCV licences, the painting of the tractors in company colours and the markings on the tractors identifying them as part of the respondent's operation. The integration of the disputed persons is evidenced by the requirement to advise the company when not reporting for work and to perform the deliveries assigned to them. The nature of the relationship insofar as it pertains to the requirement to perform as directed is evidenced by the decision of the company to ask for the return of the PCV licences from the three drivers who recently refused to undertake the deliveries assigned to them. The only conclusion that can be reached on the evidence before us is that the persons whose status is in dispute are not only in a position of economic dependence upon the respondent but also, having regard to the nature of the business relationship, under an obligation to perform duties for the respondent. In these circumstances, we must find that the relationship between these persons and the respondent is one more closely resembling the relationship between employees and an employer than between independent businesses.

12. Having regard to all of the foregoing, we are satisfied that the persons named in schedule "A" to the application who own their own tractors are dependent contractors within the meaning of section 1(1)(h) of the Act and, therefore, fall within the bargaining unit.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on January 21, 1983, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Indeed, all of the dependent contractors affected by the application signed applications for membership in the applicant union.

14. The final issue to be decided is whether the single employee driver who is not a dependent contractor should be included within a bargaining unit of dependent contractors. Section 6(5) of the Act reads:

A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.

The Legislature, by enacting this section, recognized that dependent contractors may not share a community of interest with "traditional employees" and provided, therefore,

that dependent contractors may be included in a bargaining unit with other employees only if satisfied that a majority of the dependent contractors affected wish to be included in such a bargaining unit. (See *Re Alltour Marketing Support Services Limited*, [1982] OLRB Rep. Oct. 1383.) In the face of section 6(5) of the Act, therefore, we are prevented from including dependent contractors in a unit with other employees unless satisfied that a majority of such dependent contractors wish to be included in a mixed unit.

15. However, even if the Board is satisfied that a majority of the dependent contractors wish to be included in a mixed unit it would nevertheless be required to exercise its discretion under section 6(1) of the Act to determine if that unit is appropriate for collective bargaining. The Divisional Court in *Re Northern Electric Professional Association and Ontario Labour Relations Board et al*, (1976), 14 O.R. (2d) 273 made this abundantly clear. In dealing with the effect of then section 6(3) (now 6(4)) which contains language identical to section 6(5) but in respect of a unit of professional engineers, the court said:

The authority to certify a bargaining unit is contained in s. 6(1) and nowhere else. Subsections (2), (3) and (4) of s. 6 are not self-contained grants of power to certify units. There is no power to certify found within them. They are merely guides to or constraints upon the discretion of the Board conferred by s. 6(1). Section 6(1) thus governs all applications. The Board must always consider the appropriateness of a proposed unit, as s-s. (1) requires. When the first part of s.6(3) is found to apply the Board must find a unit falling within it to be appropriate. But this does not exclude s-s. (1). The Board could, without doubt, consider conducting a vote under s-s. (1) in order to determine the wishes of the employees affected by the proposed unit.

It is inappropriate to speak of an application as falling under s. 6(3) instead of s. 6(1): all applications fall, in the first place, under s. 6(1). When an application is made by professional engineers for a "pure" unit, i.e., a bargaining unit consisting of professional engineers, and the Board is satisfied that is in accordance with the employees' wishes, the Board may allow no other. But when an application is made for a mixed unit, the Board must decide if it is appropriate. In the first case, it must be satisfied that the persons who will comprise the proposed unit are professional engineers within s. 1(1)(1) of the Act and that the employees affected desire it. This will require evidence or some investigation.

In the second case the Board must be satisfied that the proposed unit will be appropriate. This will require evidence or some investigation. Just what kind of evidence, and how much, the Board will require in any given case is for the Board to decide.

16. Where dependent contractors with substantial investment in equipment or vehicles and concerned with maximizing the return on investment (hallmarks of the



dependent contractor) are placed in a bargaining unit with “traditional employees” there will be a marked divergence in the collective bargaining interests of the two groups of employees and, where questions arise with respect to the assignment of work between the two groups an inherent strain will develop between them. In our view, this divergence in interest would invariably result in mutually exclusive bargaining units on an application of the Board’s normal community of interest criteria. However, the Legislature, although recognizing the conflict of interest when it enacted section 6(5), envisaged that dependent contractors and other employees could bargain together where a majority of the dependent contractors desire to do so and the Board finds the mixed unit to be appropriate. The difficulty, therefore, in the face of the obvious inapplicability of the standard community of interest criteria, is to determine the basis upon which to exercise our discretion under section 6(1) to determine the appropriate unit.

17. Section 6(5) focuses on the wishes of the dependent contractors and allows for a mixed unit only where the majority of the affected dependent contractors wish to bargain as part of a mixed unit. Given the inapplicability of our standard community of interest tests and the focus of section 6(5), it is our view that in the exercise of our discretion under section 6(1) to find an appropriate bargaining unit, we should test the wishes of the “traditional employees” who stand to be affected. It is our view that “traditional employees” should not be swept into a mixed unit against their will but should put their minds to the question and make a majority decision in this regard. Accordingly, where a majority of the “traditional employees” have signed membership cards in the applicant but the Board is not satisfied on the evidence before it at the hearing that a majority of these employees wish to bargain in a mixed bargaining unit, the Board will conduct a vote under section 6(1) to determine whether or not a majority of the “traditional employees” wish to bargain as part of a mixed unit. Where, in addition to a majority of dependent contractors, a majority of the other employees also desire to bargain within a mixed unit, the Board, in the knowledge that the duty of fair representation applies, will be prepared to exercise its discretion under section 6(1) to find the mixed unit to be appropriate. It is to be observed that under the British Columbia statute, where dependent contractors must bargain within an established bargaining structure, it is envisaged that the inherent conflict between the two groups can be accommodated.

18. Given the potential for tension between dependent contractor employees and traditional employees of the same employer doing essentially the same work, as in this case, we are not prepared to conclude that the posting of a unit description of “all truck drivers being supplied with goods and materials by the employer” coupled with the signing of membership cards and a failure to intervene at the hearing, as in the case of both the dependent contractor truck drivers and the employee truck driver in this matter, constitutes evidence upon which the Board can reasonably infer that either the dependent contractor truck drivers or the employee truck driver wish to bargain in a mixed unit. There was no cogent evidence going to the wishes of employees in this regard put before us at the hearing. Accordingly, we hereby exercise our discretion under section 6(1) of the Act to direct the taking of two representation votes. In the first, the dependent contractor truck drivers employed by the respondent and listed on Schedule A to the application are to be asked whether or not they wish to be included in a bargaining unit with other employees. In the second, the preconditions to the taking of such a vote among the non-dependent contractor employees, as enunciated in

the previous paragraph, having been satisfied, the single employee truck driver is to be asked whether or not he wishes to be included in a bargaining unit with the dependent contractor truck drivers employed by the respondent. The Registrar is directed to make the necessary arrangements in respect of each of these votes.

19. The result of the aforementioned votes cannot affect the applicant's ultimate entitlement to certification. Accordingly, even though the inclusion or exclusion of the single employee truck driver from the bargaining unit is unresolved, we hereby certify the applicant pursuant to section 6(2) of the Act as bargaining agent for all dependent contractors engaged as truck drivers working at or out of Guelph, Ontario, save and except dispatchers, persons above the rank of dispatcher and office and clerical staff. The final description of the bargaining unit must await our ultimate determination as to whether or not the single employee truck driver is included or excluded from it.

20. This matter is hereby referred to the Registrar.

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**1713-82-U; 1714-82-OH Stanley Gray, Complainant, v. L. J. Bergie, Respondent; Stanley Gray, Complainant v. Westinghouse Canada Inc., Respondent**

**Health and Safety - Practice and Procedure - Unfair Labour Practice - Two separate complaints filed against unrelated respondents - One alleging unfair labour practice - Other complaint under safety legislation - No overlap on critical facts - Board refusing request for consolidation of two complaints**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members I. M. Stamp and Stewart Cooke.

**APPEARANCES:** *James Hayes, David Bloom and Stan Gray for the complainant; H. P. Rolph and L. J. Bergie for the respondent L. J. Bergie; Ross Dunsmore, Steven Moate and Gary Sparks for the respondent Westinghouse Canada Inc.*

**DECISION OF THE BOARD;** February 25, 1983

#### *INTERIM DECISION*

1. The Board has before it two complaints filed by Mr. Stanley Gray which Mr. Gray, through his counsel, asks the Board to consolidate, or "hear together". The complaints involve entirely unrelated respondents, and both respondents oppose the request to consolidate. The Board is called upon, therefore, to render a ruling on this request.

2. The first complaint is of an unexceptional variety, and alleges that the complainant's employer, Westinghouse Canada Inc., has dealt with the complainant contrary to the provisions of section 24 of the *Occupational Health and Safety Act*. Section 24(1), in particular, provides:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

The second complaint is acknowledged to be unique. It alleges that Mr. L. J. Bergie, a senior official of the Occupational Health and Safety Branch of the Ministry of Labour, in the course of handling complaints and carrying out inspections at Mr. Gray's place of employment, dealt with Mr. Gray in a manner which violates sections 3 and 70 of the *Labour Relations Act*. Those sections provide:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

3. Undoubtedly, the Board in dealing with these complaints will be called upon to examine closely each incident where Mr. Gray came into apparent conflict with one or the other of the named respondents, and to characterize the responses of the respondent in each instance. It is obvious that the ongoing question of health and safety control in this plant forms the backdrop against which both complaints evolve. But there the commonality between the two complaints essentially ends. Each complaint sets out a long list of clashes and incidents in which Mr. Gray and one of the respondents became involved, but those specific and critical incidents are virtually without overlap in the two cases. The filings do *not*, for example, raise common inspection incidents at which the Ministry respondent and the employer respondent are alleged to have together dealt improperly with the complainants. Nor is a theory of common design put forward. Rather, the theory of liability in each complaint is wholly distinct, as one might expect in view of the wholly different roles and obligations of the two named respondents.

4. The Board has limited jurisprudence of its own in the area of consolidation, and the only authority referred to in which the Court comments on the similar



discretion which it possesses under the Supreme Court Rules of Practice is *Samuel v. Klein*, (1976) 3 C.P.C. 21. That case bore significant distinctions from this one on its facts, but Estey, J., at that time the Chief Justice of the High Court, described the test as follows, at pages 25 and 26:

... The general proposition as to the right in a plaintiff to combine causes of action against defendants or groups of defendants has been set forth by Scrutton L. J., in *Payne v. Br. Time Recorder Co.*, [1921] 2 K.B. 1 at 16, [1921] All E.R. 388 (C.A.) as follows:

“It is impossible to lay down any rule as to how the discretion of the Court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.”

It is important to observe that the foregoing general statement of the law is expressed in terms of “a common question of law or fact bearing sufficient importance in proportion to the rest of the action”.

For the reasons given above, the complaints before the Board in this case would not meet that test.

5. The Board’s own Rules of Procedure describe the Board’s discretion on this point in the following terms:

81. Where the Board deems it necessary, it may at any time direct that a proceeding before the Board be consolidated with any other proceeding before the Board and it may issue such directions in respect of the conduct of the consolidated proceeding as it considers advisable.

“Where the Board deems it necessary” presumably refers to what the Board considers necessary to fairly and properly effectuate the policies of the statute it is administering, and reasonable access to the Board’s procedures is obviously a major consideration in this regard. But the legitimate interests of the other parties must be weighed in the balance as well, and, in a given case, important considerations of public policy may also come into play.

6. In making our judgement in the unusual case now before us, it is essential to consider the structure of the *Occupational Health and Safety Act, 1978* itself. It is evident that in enacting the statute the Legislature was keenly sensitive to the issue of health or safety-oriented work refusals, and to the need to provide a method of handling such refusals which can accommodate in a given case the employee’s doubts about safety, with the employer’s concern over unfounded interruptions of work. The

intervention of a knowledgeable third party in the person of Ministry of Labour representatives is a critical part of the dispute-resolution mechanism provided by the Act, and its effectiveness is dependent upon the credibility and perceived neutrality of those representatives. Indeed, while the complaint against the Ministry's Mr. Bergie is that he "overstepped his bounds" and became too actively involved on one side as against the other, the very purpose of this unusual complaint, as counsel acknowledges, is to seek to preserve the essential neutrality of Ministry representatives. The complaint, in other words, is that Mr. Bergie himself became too much of a protagonist in the employer-employee conflict. In the Board's view, it would tend to effectuate neither the purpose of this particular complaint, nor the policy of the *Occupational Health and Safety Act* itself, to now force Mr. Bergie to become a protagonist in the employer-employee proceedings before the Board.

7. For these reasons, together with the lack of overlap on critical facts between the two complaints, the Board is of the view that these complaints should be heard separately, and the request for consolidation is dismissed.

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**2407-81-U William Egan, Complainant, v. Trial Board of the International Brotherhood of Painters and Allied Trades, Local 1783, Respondent**

**Practice and Procedure – Trade Union – Unfair Labour Practice – Trial Board appointed under union constitution agent of union – Properly named as respondent – Complainant charged and convicted under union constitution – Complainant's financial statement complaint part of reason for conviction – Conviction and penalty ordered rescinded**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and W. F. Rutherford.

**APPEARANCES:** *William Egan for the complainant; A. M. Minsky for the respondent.*

**DECISION OF THE BOARD; February 7, 1983**

1. This complaint, which alleges violation of section 80(2)(b) of the *Labour Relations Act*, was made simultaneously with two other complaints; Board File No. 2406-81-U alleging violation of section 82(1); and Board File No. 2408-81-U alleging violation of section 82(2)(a) of the Act. The three complaints were listed for hearing together with the complaint contained in Board File No. 0681-81-M, a complaint made under section 85(2) of the Act alleging that an audited financial statement supplied to the complainant by Local 1783 pursuant to its duty under section 85(1) was inadequate. That complaint had been heard by the Board, differently constituted some five months previously and the complainant had requested that the matter be brought back on for hearing on the grounds that the financial statement supplied remained inadequate. The

Board herein consented to the adjournment of that complaint sine die on the agreement of the parties and a decision to that effect has issued.

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3. The solicitors for the respondents in the three remaining complaints had served due notice on the Board and the complainant that motions would be made at the hearing seeking dismissal of each complaint without a hearing on various grounds, including the contention that they failed to disclose any violation of the sections of the Act which the complaints allege to have been violated. Accordingly, counsel for the respondents asked the Board at the outset of hearing to dismiss all three complaints without a hearing. The Board heard and considered the full submissions of the parties on these motions and ruled at the hearing, for reasons given in decisions which have since issued, that it would not hear the complaints in Board File Nos. 2406-81-U and 2408-81-U and dismissed those complaints.

4. With respect to the complaint at hand, counsel's motion to dismiss it without a hearing was based on the additional grounds that:

(a) the allegations were unsupported by particulars, notwithstanding a duly made request for further particulars, thus all allegations should be stricken from the complaint and the Board should dismiss it pursuant to section 72(3) of the Board's Rules of Procedure; and,

(b) the respondent named in the complaint is not a person, a trade union or an agent acting for a trade union, therefore, there is no eligible party against which a cause of action can be made out under section 80(2)(b) of the Act.

Section 80(2)(b) provides as follows:

80.-(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

(a) ...

(b) intimidate or coerce or impose a pecuniary or other penalty on a person.

5. The Board ruled that there was sufficient substance to the complaint to warrant hearing it on its merits, but before proceeding to do so, adjourned the hearing until the following day and granted the complainant leave to amend the name of the respondent to the complaint in order to clarify whether it was a complaint against:

(a) Local 1783 alone;

(b) any one or more named members of the trial board; or,



- (c) Local 1783 and any one or more named members of the trial board.

All of these parties were present in the hearing. The Board also advised the complainant, William Egan, that if he failed to file further particulars with counsel for the respondent, the Board would limit him to calling evidence on those allegations in the complaint which were supported by particulars.

6. At the commencement of the hearing on the following day, Egan asked leave of the Board to amend the name of respondent in the complaint to read "Trial Board of the International Brotherhood of Painters and Allied Trades, Local 1783". The Board amended the style of cause of the complaint accordingly. Egan advised the Board that he had supplied further particulars to counsel for the respondent following the adjournment of the hearing the previous day.

7. Counsel for the respondent protested that naming the Trial Board was tantamount to naming individually the persons who comprise it. Counsel reiterated his motion to dismiss the complaint without a hearing because the respondent, as amended, is not a trade union or a person acting on behalf of a trade union. The Board ruled that it was at least arguable that the Trial Board members were persons within the meaning of section 80(2) of the Act when acting in their duties as a trial board pursuant to their appointment under the constitution of the International Brotherhood of Painters and Allied Trades ("the Brotherhood"). Therefore, the Board would reserve its ruling on whether they were persons acting on behalf of a trade union until it had heard all of the evidence and argument of the parties on the merits of the complaint including any further representations on this issue, and decide the question of whether the Trial Board members were persons acting on behalf of a trade union. If the Board found they were not, that would dispose of the complaint. If it found the contrary, the Board would decide the complaint on its merits.

8. There were six days of hearings held over a four month period during which the Board heard the evidence of eight witnesses including Egan; William Davis, John Kolju, Neil Gallacher and Patrick P.D. O'Reilly who comprised the Trial Board; Peter Van de Wetering and Edward S. Bates, members of Local 1783; and Ronald J. Last, business representative for the Local. Along with the oral evidence of these witnesses, the Board received a substantial volume of documentary evidence and, while the Board has reviewed and considered all of the oral and documentary evidence in making the findings of fact herein, it is unnecessary to set the evidence out in detail. The findings of fact have been made after taking into account, as well, the consistency of each witness' evidence, their ability to recall the event about which they were testifying, the firmness of their memory, their ability to resist the influence of self-interest to modify their recollections, their ability to express their recollections clearly and their demeanour.

9. The thrust of Egan's complaint is that separate charges were filed against him by Bates and Van de Wetering under the Brotherhood's constitution because Egan had filed the financial statement complaint referred to above and that the Trial Board was influenced against his interest in hearing those charges because he had filed the

financial statement complaint. He contends that the Trial Board found him guilty as charged in both instances because he had filed the financial statement complaint. For this reason he had refused to pay the fines levied for each charge and, as a result of his refusal to pay the fines, he would cease to be a member in good standing of Local 1783. He further contends that, lacking membership in good standing, he would lose his employment with Ontario Hydro and his right to be referred to work by Local 1783.

10. In April 1981, the executive board of Local 1783 entered into an agreement with the executive board of the Ontario Provincial Council of the Brotherhood to take steps to merge the Local with Sarnia Local 1590 of the Brotherhood. It was part of that agreement that Last, who was business representative of Local 1590, would become business representative of Local 1783 and was authorized to appoint an assistant business representative for Local 1783 to act under his direct control. The executive board of Local 1783 resigned following this agreement and trustees were elected in their places, Egan being one of the trustees.

11. He subsequently laid seventeen charges under the Brotherhood's constitution against the former members of Local 1783's executive board, officials of the Brotherhood, including David Cairns its senior officer in Canada and Last. Two of these charges were made against Van de Wetering alleging him of misconduct in the discharge of his former office of secretary-treasurer with respect to the aforementioned agreement to merge with Local 1590.

12. Egan's charges against the former executive board members were heard by the Trial Board which is named in the style of cause herein on September 1st, 2nd and 3rd, 1981. Egan appeared for the proceedings on September 1st but left before those proceedings were adjourned after what might be described politely as a rather heated exchange between him, the chairman of the Trial Board, some of its members and other persons present. For reasons of his own, he did so without calling evidence on his charges and he chose not to return for the continuation of those proceedings on September 2nd and 3rd. The Trial Board heard and considered the evidence of the persons charged and dismissed Egan's charges as not being proven.

13. The make-up of the Trial Board was a matter of contention with Egan when the hearing into his charges against the executive board members began on September 1st and remained in contention at the hearing into this complaint. At the Trial Board hearing on September 1st, Egan referred to its members as a "bunch of Turkeys who were running a Kangaroo Court ..." and charged that O'Reilly, who was acting as chairman of the Trial Board and Last, who was presenting the defence for the persons charged, were biased against him.

14. Last, who was responsible for the administration of all of Local 1783's affairs pursuant to the aforementioned agreement, had appointed O'Reilly as the assistant business representative for the Local pursuant to that agreement. It was Last who appointed O'Reilly as Trial Board Chairman. O'Reilly in turn appointed the three other members. Last was asked by the former executive board members who had been charged by Egan to represent them at the Trial Board hearing. Since Last was also charged and those charges were being heard, he also represented himself.

15. When Egan cross-examined Last in the instant proceedings about his reasons for appointing O'Reilly as chairman of the Trial Board, Last stated that he had done so because there were no executive board members of the Local and O'Reilly was assistant financial secretary of Local 1783 as well as its assistant business representative. Egan also cross-examined O'Reilly about his own appointment and about his choice of the Trial Board members. O'Reilly admitted that, as assistant business representative, he might not be eligible to be on the Trial Board, but he thought that he was eligible as assistant financial secretary of the Local. He stated also that he selected Davis and Gallacher as members of the Trial Board because they were trustees of the Local and Kolju because the remaining trustees were parties interested in the Trial Board proceedings thus ineligible to be on it.

16. This same trial board was later to hear the charges against Egan which form the basis of this complaint. Egan had made a request in writing to Local 1783 that Bates' competency to hold membership in the Brotherhood be examined. As a result of this request, Bates charged Egan under a section of the constitution which deals with libel, slander or any manner of abusing, inter alia, fellow members of local unions. Van de Wetering also filed charges against Egan under the constitution to the effect that Egan's two charges against him were not made in good faith. Both of these charges subsequently came to hearing before the Trial Board.

17. Egan's request that Bates' competency to hold membership in the Local be examined was not pursued by the local on advice of its solicitors that the union would be acting without constitutional jurisdiction or authority if it did and would be at the risk of exposure to legal liability should Mr. Bates sue as a result of this action. Bates' charges against Egan were heard by the Trial Board on September 23rd, 1981. Egan attended and presented some evidence in his defence but left before the proceedings were completed. The Trial Board continued with the proceedings after Egan's departure and heard the evidence and representations in support of Bates' charges. These were made by Last who was acting for Bates at his request. The hearing was concluded in one sitting and, immediately following the hearing, the Trial Board met, reviewed the evidence which it had received and found Egan guilty as charged. It determined that he should be fined the sum of \$500.00 which was to be paid within 30 days from the 23rd day of October, 1981.

18. Van de Wetering's charges against Egan were heard on October 6th, 1981. Egan had not appeared by 7:00 P.M., the scheduled time for the hearing so the Trial Board satisfied itself that proper notices had been sent to him by registered mail and being satisfied commenced the proceedings at 7:30 P.M., at which time Egan was not in attendance. Van de Wetering had requested that Last act for him at the hearing and Last introduced evidence in support of Van de Wetering's charges. The main thrust of his case was that Egan had waged a campaign of harassment against Van de Wetering, the other former executive board members and the Local union as a body. He presented evidence which included some 28 pieces of correspondence between Egan and the Local relating to his charges against the former executive board members, with general officers of the Brotherhood and with various government agencies, including this Board. The correspondence with respect to this Board related to his financial statement complaint and included the complaint itself. Oral evidence was also presented at the Trial Board hearing with respect to the financial statement complaint filed by Egan.



against Local 1783. After the hearing was concluded, the Trial Board met and reviewed the evidence and representations that had been made at the hearing in support of Van de Wetering's charges and found Egan guilty as charged. The members of the Trial Board decided that he should be barred from attending any meetings of Local 1783 for a period of five years and not be allowed any voice or vote in its affairs. It decided that he also should be fined the sum of \$1,000.00 to be payable within 90 days from the 19th day of October, 1981. The oral and documentary evidence which the Trial Board considered is also before the Board herein. It reveals that the financial statement complaint was part of the Trial Board's considerations in convicting Egan and imposing the fine and other penalty.

19. Egan refused to pay the fines and, at the time the hearings into this complaint were concluded, he still had not paid them. He appealed to the Brotherhood the Trial Board's findings with respect to the charges against him in each of those two cases. His appeal was not allowed on the grounds that he had not paid his fines.

20. Egan argued that the manner in which the Trial Board was constituted violated the Brotherhood's constitution. He did not specify how the constitution had been violated. Nor did he call evidence of any assistance to the Board in determining whether there is a violation of the constitution. In these circumstances, and in view of the Board's oft expressed natural reluctance to intervene in the internal affairs of a trade union unless the need to do so is essential to a determination under the Act, the Board is not prepared to conduct its own enquiry into the constitution to determine whether it was followed with respect to the appointment of the Trial Board. In any event, that is not the question before the Board. The question is whether section 80(2)(b) of the Act has been violated because Bates' and Van de Wetering's charges were filed against him in response to his financial statement complaint to the Board and because the Trial Board was improperly influenced by his complaint when it decided those charges. Therefore, a finding that the constitution had not been followed, by itself, would not be determinative of the complaint, although it might be a factor to be weighed by the Board in deciding what inferences to draw from all of the evidence.

21. The Board is of the view that Last, being responsible for the running of the affairs of the union absent any elected officers, found himself severely limited in the choice of persons eligible to be chairman of the Trial Board and selected O'Reilly as the only person in a position of responsibility who could fulfill that role. For similar reasons, O'Reilly had a limited choice of persons qualified to sit as members of a trial board because most of the elected trustees were persons interested in or affected by the proceedings, particularly those with respect to the charges filed by Egan. While, with the benefit of hindsight, it might be said that Last and O'Reilly did not give sufficient consideration to their respective appointments, the evidence falls short of convincing the Board that their selections were made with a view to having a trial board to which either of them could dictate, assuming, as Egan obviously suspected, that they wished to have him expelled from Local 1783. The Board had the benefit of assessing each member of the Trial Board as a witness in these proceedings and it is satisfied that they would not tolerate any attempt to use them in that manner.

22. All of this is not to say that Last could not have shown greater appreciation for the perception which Egan would have for a trial board appointed in the manner of

this one, whether hearing his own charges or those made against him. While the Trial Board composition and proceedings may not have deserved the mixed metaphor which Egan used to describe them, having regard for the fact that O'Reilly owed to Last his own appointment as assistant business representative and for the fact that Last appeared at the Trial Board hearings to defend those persons whom Egan had charged, it is not surprising that Egan viewed the Trial Board and its proceedings with suspicion. In the interest of having its members perceive the union's internal procedures as being fair, it seems to the Board that Last and O'Reilly might have sought a different solution to the problem of finding suitable appointments to the Trial Board.

23. The Board must now consider the contention of counsel for the respondent that the complaint fails to name a party against which a cause of action can be made out under section 80(2)(b) of the Act because the respondent is neither a trade union nor a person acting on behalf of a trade union. Counsel argues that naming the Trial Board is tantamount to naming the individuals of whom it is comprised and, whether acting collectively as the Trial Board or individually as private ordinary members of Local 1783, they are not acting on its behalf. He does not deny that it is a constitutional element of the union process and an instrument of the union. Counsel contends, however, that an agency relationship between the Trial Board and Local 1783 does not exist because the Trial Board is made up of members who are pledged to make a decision on the evidence before it independent of any control over its decision by Local 1783. Counsel acknowledges that a local trial board is usually made up of executive board members of the local union but in this case was not because of the peculiar circumstances existing, but he asserts that the executive board members are pledged also to make decisions independent of any control by its local.

24. While the Board agrees that a local trial board is usually made up of the executive board members of the local union and naming the Trial Board as respondent is tantamount to naming the individuals who sat on it, that is as far as the Board can agree with counsel. Section 247, clauses (a) and (c) of the union's constitution set out how a local trial board is to be appointed. They establish the members of a local's executive board as the trial board except *inter alia*, where any of them are disqualified as being interested parties. In such case, the President, or if he is unable to act, another responsible officer, will appoint a disinterested member. Sections 248 through 262 of the constitution sets out the procedures for the conduct of trials, for making decisions and setting penalties. If the penalty includes a fine against a member, clause (a) of section 256 provides for it to be assessed by and paid to the local union. The charges must relate to violations of the constitution or to prohibited acts for which specific penalties are applicable and the Trial Board must receive and consider the substantial evidence relative to the constitutional provision under which the charge has been laid.

25. In view of the foregoing conditions under which a trial board functions, the Board is impressed to conclude that the Trial Board of the International Brotherhood of Painters and Allied Trades, Local 1783, collectively acts on behalf of Local 1783 when it is fulfilling its mandate under the constitution. There is no evidence that it was not acting under the constitution in these matters. Therefore, the Trial Board and its individual members were acting on behalf of Local 1783 when they were processing and determining the charges against Egan and in laying the fines upon finding him

guilty as charged. The Board finds therefore, that each member of the Trial Board is a person acting on behalf of Local 1783 and is a party against which a cause of action can be made out under section 80(2)(b) of the Act.

26. Accordingly, the Board must determine the complaint on its merits.

27. If this complaint of violation of section 80(2)(b) is to succeed on these facts, it must be on the second of the two prohibitions, that is the prohibition against intimidation, coercion or imposition of a pecuniary or other penalty. While Egan's concern is with the possible loss of his employment with Hydro and his disbarment from the Local 1783 employment referral system as a result of his refusal to pay the alleged improper fines, the facts would not support a finding of discrimination against him in regard to his employment or a term or condition of his employment. Its success depends as well on whether the Trial Board was influenced improperly against Egan because of the financial statement complaint which he had filed against Local 1783.

28. There was no direct evidence that Egan's financial statement complaint formed part of the Trial Board's decision with respect to Bates' charges and the Board is not prepared to draw that inference from the evidence before it. Egan asks the Board, however, to find a link between Bates' and Van de Wetering's charges on the grounds that they colluded with O'Reilly to bring those charges and, therefore, that the Trial Board's findings on Bates' charges were tainted with the same improper consideration of his financial statement complaint to the Board that he alleges was the case with the Trial Board's decision on Van de Wetering's charges. The evidence simply does not substantiate his claim of collusion or any other link between the two sets of charges other than they share in common the fact that they were against Egan and heard by a trial board in each case constituted by the same persons.

29. Counsel for the respondent argues, in part, that the Board must be able to find that Egan's financial statement complaint triggered either or both sets of charges laid and formed part of the trial process and the convictions in order to find any violation of section 80(2)(b). He asserts that it is incontrovertible that the financial statement complaint played no part whatsoever with the initiation or processing of Bates' charges. The Board concurs with counsel on that point and, therefore, this complaint is dismissed insofar as it relates to those charges and Egan's conviction by the Trial Board as charged.

30. The Board does not agree with counsel that the Board would have to find that Egan's financial statement complaint was both the trigger for the charges against him and formed part of the trial process and his conviction by the Trial Board in order for these to be a violation of section 80(2)(b). The laying of charges clearly is something which a member does in his own right and is quite distinct from the processing of his charges beyond that point, a process which falls to the responsible officers of the local union and the duly appointed trial board to carry out. Therefore, in the Board's view, if Egan's exercise of rights under this Act formed part of the processing of Van de Wetering's charges or the Trial Board's consideration of those charges, it would be unnecessary for the Board to find that Van de Wetering was influenced in filing the charges by Egan's exercise of a right under the Act.



31. There can be no doubt from the oral and documentary evidence before this Board that Egan's financial statement complaint was part of the evidence against him in his trial on Van de Wetering's charges, was considered by the Trial Board and formed part of its reason for finding him guilty as charged. Counsel for the respondent argues that the correspondence between Egan and the Board about that complaint was just part of the packet of 28 documents which were essential to the proof that Egan had acted in bad faith against Van de Wetering when Egan made his earlier charges against Van de Wetering, that it was necessary for Last who was representing Van de Wetering at the trial to put the complete case in but that there was substantial evidence to support Van de Wetering's charges without the complaint documents and, counsel states, all that the constitution requires of the Trial Board is that it hear and consider the substantial evidence with respect to the charges before it. Counsel argues also that the Trial Board's use of that packet of documentary evidence was to balance the charges which Egan had made against Van de Wetering and other former Executive Board members with Van de Wetering's charges that Egan had charged him in bad faith and, in so doing, the Trial Board did not place particular significance on the evidence about Egan's financial statement complaint.

32. The evidence before the Board does not show that the Trial Board placed particular significance on the evidence of Egan's complaint in convicting him of Van de Wetering's charges, to that extent we agree with counsel. The question is, however, by giving the consideration which it did to his exercise of a right under the Act, has the Trial Board, as agent of Local 1783, violated section 80(2)(b) of the Act?

33. In deciding this type of question where there is an alleged violation of those unfair labour practice sections which protect employees or persons in the exercise of their rights under the Act, the Board is concerned with the motivation for the impugned action and if the action was only partly motivated by the fact the person had exercised a right under the Act the Board would find a violation. For example, in the context of section 80(1) of the Act if an employer was alleged to have imposed a pecuniary penalty on an employee for reasons which included a valid or proper reason and the reason that the employee had exercised a right under the Act, the Board would find the employer to have violated the Act because part of the motivation for imposing the penalty was the employee's exercise of a protected right. This approach has become known as "the taint theory". The Board applied that theory in a recent decision, *International Association of Bridge, Structural and Ornamental Ironworkers Union and Norman Wilson and James Phair*, [1982] OLRB Rep. Oct. 1487, in the process of finding that the respondent trade union had violated section 80(2) of the Act. The Board in that case reviews thoroughly the legal rationale underlying the taint theory at paragraphs 67 through 72 of the decision. The Board then goes on to apply that legal framework to the facts. It is clear from its analysis of the law and the facts that the presence of an improper motive does not have to form a dominant or substantial part of the whole motivation in order to trigger a violation of the Act, in that case section 80(2)(b), the same section of the Act with which the Board herein is concerned.

34. The facts in this case reveal clearly that the Trial Board took into consideration Egan's exercise of an important right under this Act in finding him guilty of Van de Wetering's charges, for which the Trial Board imposed a five-year ban on Egan having any voice in the affairs of Local 1783 and a \$1,000 fine. For this reason, the

Board finds that the Trial Board, an agent of Local 1783 has violated section 80(2)(b) of the *Labour Relations Act*.

35. In the result, the complainant, William Egan, has been upheld with respect to that branch of his complaint relating to Peter Van de Wetering's charges against him and not on the branch relating to Edward Bates' charges. Having regard for that result and with respect to his conviction by the Trial Board on Bates' charges, if Egan has not paid the \$500.00 fine imposed on him and fails to do so within a reasonable period of time after the date of this decision, he may be subject to further sanctions by Local 1783 under the constitution of its International Brotherhood of Painters and Allied Trades.

36. With respect to the Board's findings that there has been a violation of section 80(2)(b) of the *Labour Relations Act* as a result of William Egan's conviction by the Trial Board of the International Brotherhood of Painters and Allied Trades, Local 1783, as charged by Peter Van de Wetering, the Board orders that the said conviction be rescinded together with the five-year ban on voice or vote participation in the affairs of Local 1783 and the \$1,000 fine and any record of it removed from the records of the Brotherhood and Local 1783.

37. The Board is constrained to not leave this matter without commenting about the evidence which it heard relating to the conduct of the complainant William Egan towards the former and present officials of Local 1783 and some of its members. There is little room for doubt that his conduct exceeded the bounds of reasonable dissent and, to say the least, bordered on harrassment. In the Board's view, Egan has been the author of his own misfortune. In other circumstances, similar conduct by him towards his union might be unprotected by the Act.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD JANUARY 1983

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**0755-81-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Silver Carpentry Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foreman and person above the rank of non-working foreman." (12 employees in unit). *(Having regard to the agreement of the parties).*

**0546-82-R:** United Rubber, Cork, Linoleum and Plastic Workers of America, (Applicant) v. BF Goodrich Canada Inc., (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant at 131 Goodrich Drive in the City of Kitchener, save and except foremen, persons above the rank of foreman, watchmen, guards, office employees, and persons covered by a subsisting collective agreement." (23 employees in unit).

**0549-82-R:** Ontario Nurses' Association, (Applicant) v. Lennox and Addington County General Hospital Association, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity of the respondent, at Napanee, save and except nursing supervisors, persons above the rank of nursing supervisor and persons regularly employed for not more than twenty-four (24) hours per week." (16 employees in unit). *(Having regard to the agreement of the parties).*

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity of the respondent for not more than 24 hours per week save and except nursing supervisors and persons above the rank of nursing supervisor." (6 employees in unit). *(Having regard to the agreement of the parties).*

**0677-82-R:** Labourers' International Union of North America, Local 1036, (Applicant) v. Reliable Window Cleaners (Sudbury) Limited, (Respondent).

Unit: "all employees of the respondent engaged in cleaning services at the Offices of the Eldorado Nuclear Refinery, Blind River, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady and office, clerical and sales staff." (2 employees in unit). *(Having regard to the agreement of the parties).*

**0975-82-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, (Applicant) v. Baker McSweeney's, a Division of Sundance Cookies Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (33 employees in unit).

**1481-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. MCI Management Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1494-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. MacKenzie Reality Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**1517-82-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Ideal Plumbing Supplies Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working Ottawa, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (13 employees in unit). (*Having regard to the agreement of the parties*).

**1621-82-R:** United Steelworkers of America, (Applicant) v. GSW Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees of the respondent at its Building Products Division at Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor and sales staff." (19 employees in unit).

**1635-82-R:** Retail Clerks Union, Local 409, (Applicant) v. White Otter Inns Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Township of Atikokan, save and except managers, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (11 employees in unit).

Unit #2: "all employees of the respondent in the Township of Atikokan regularly employed for not more than twenty-four (24) hours per week and students employed during the school



vacation period, save and except managers and persons above the rank of manager." (6 employees in unit).

**1680-82-R:** United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Zymaize Company, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at London save and except Team Leaders, persons above the rank of Team Leader, engineering and laboratory staff, office and sales staff, students employed in a co-operative training programme, regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement." (89 employees in unit).

**1699-82-R:** Labourers' International Union of North America Local 506, (Applicant) v. Hehl Construction Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

**1729-82-R:** The Industrial Metal Workers' Union, (Applicant) v. R. J. Stampings Co. Inc., (Respondent) v. R. J. Stampings Co. Inc. Employees' Association, (Intervener).

Unit: "all employees of the respondent at Smiths Falls, Ontario, save and except foremen, persons above the rank of foreman, security guards, office and clerical staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (140 employees in unit). (*Having regard to the agreement of the parties*).

**1743-82-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, (Applicant) v. Bidoll Construction Limited, (Respondent).

Unit #1: "all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all reinforcing rodmen in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**1750-82-R:** Ontario Public Service Employees Union, (Applicant) v. Danver Ambulance Service Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Flamborough, Ontario, save and except owner-operator, supervisor and persons above the rank of supervisor." (11 employees in unit). (*Having regard to the agreement of the parties*).

**1764-82-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Bay Beverages Ltd., (Respondent).

Unit: "all employees of the respondent at Thunder Bay, Ontario, save and except foremen and supervisors, persons above the rank of foreman and supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

**1771-82-R:** Retail, Wholesale and Department Store Union, (Applicant) v. Shirley Leishman Books Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Ottawa and the Township of Nepean save and except store managers and persons above the rank of store manager." (17 employees in unit). (*Having regard to the agreement of the parties*).

**1776-82-R:** Service Employees International Union, Local 663, AFL, CIO, CLC, (Applicant) v. Belleville General Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (48 employees in unit).

**1787-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation 482, (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 135 Marlee Avenue, Toronto, Ontario, including resident superintendents, save and except property manager and persons above that rank." (3 employees in unit). (*Having regard to the agreement of the parties*).

**1788-82-R:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Armbro Transport Ltd., (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff, dispatchers, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (3 employees in unit). (*Having regard to the agreement of the parties*).

**1801-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Respondent) v. Frann Distributing Limited, (Respondent).

Unit: "all office and clerical employees of the respondent in Metropolitan Toronto, save and except office manager, those above the rank of office manager, secretary to the President, students employed during the school vacation period and those persons covered by subsisting collective agreements." (7 employees in unit). (*Having regard to the agreement of the parties*).

**1802-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Kilderkin Investments Ltd., (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 55 Park Street, Mississauga, Ontario, including resident superintendents, save and except property manager and persons above the rank of property manager." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1808-82-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Bay Beverages Ltd., (Respondent).

Unit: "all office and clerical employees of the respondent at Thunder Bay, Ontario, save and except supervisors, persons above the rank of supervisor, confidential secretary to the President, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

**1810-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Avid Construction Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foremen." (5 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

**1820-82-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, (Applicant) v. HLO Iron and Manufacturing Co. Ltd., (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. (2 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1827-82-R:** The International Brotherhood of Painters and Allied Trades, Local 200, (Applicant) v. St. Lawrence Caulking and Supply Co. Ltd., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

**1829-82-R:** Health, Office & Professional Employees, a division of Retail, Commercial & Industrial Union, Local 206, chartered by the United Food & Commercial Workers International Union, (Applicant) v. Sara Vista Nursing Home, (Respondent).

Unit: "all employees of the respondent at Elmvale, Ontario, save and except registered nurses, the director of nursing and persons above the rank of director of nursing." (31 employees in unit). (*Having regard to the agreement of the parties*).



**1843-82-R:** Christian Labour Association of Canada, (Applicant) v. Brucefield Manor Ltd., and Brucefield Manor Retirement Lodge, (Respondent).

Unit: "all employees of the respondent at Mount Pleasant, Ontario, save and except registered nurses, graduate nurses, director of nursing and persons above the rank of director of nursing." (26 employees in unit). (*Having regard to the agreement of the parties*).

**1867-82-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Inter-City Welding Supplies Co. Ltd., (Respondent).

Unit: "all employees of the respondent at Hanover, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1877-82-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Fisons Western Corporation, (Respondent).

Unit: "all employees of the respondent at St. David's, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff." (8 employees in unit). (*Having regard to the agreement of the parties*).

**1890-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Eastwood Food Services Limited, (Respondent).

Unit: "all employees of the respondent at 155 College Street in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, those persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).

**1891-82-R:** United Food and Commercial Workers International Union, Local 1105P, AFL, CIO, CLC, (Applicant) v. Cuddy Food Products Ltd., (Respondent).

Unit: "all employees of the respondent at London, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except truck drivers, foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff." (5 employees in unit). (*Having regard to the agreement of the parties*).

**1903-82-R:** The Association of the General Studies Teachers in Hebrew Day Schools, (Applicant) v. The Leo Baeck Day School, (Respondent).

Unit: "all employees employed as Teachers by the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, Assistant Director of Judaic Studies, persons above the rank of supervisor and Assistant Director of Judaic Studies, office and caretaking staff." (37 employees in unit). (*Having regard to the agreement of the parties*).

**1910-82-R:** Labourers' International Union of North America Local 527, (Applicant) v. West-End Tile Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding

the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**1911-82-R:** Hotel, Motel and Restaurant Employees and Beverage Dispensers' Union Local 757, of the Hotel Employees and Restaurant Employees International Union, AFL, CIO, CLC, (Applicant) v. Joe Lazazzere c.o.b. as Tim Horton Donuts, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, office and clerical staff." (17 employees in unit). (*Having regard to the agreement of the parties*).

**1912-82-R:** Service Employees Union, Local 204 affiliated with the AFL, CIO, CLC, (Applicant) v. Leisure World Nursing Homes Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors or foremen, persons above the rank of supervisor or foreman, office staff and persons covered by subsisting collective agreements or certificates." (173 employees in unit). (*Having regard to the agreement of the parties*).

**1919-82-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moto-Rite, Division of Acklands Limited, (Respondent).

Unit: "all employees of the respondent in Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (10 employees in unit). (*Having regard to the agreement of the parties*).

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**1518-82-R:** Canadian Union of Public Employees, (Applicant) v. Laurier Manor Limited, (Respondent) v. Le Syndicat Des Employes Du Manoir Laurier Ltd. (C.S.N.) The Union of Laurier Manor Ltd. Employees (C.N.T.U.), (Intervener).

Unit: "all employees of the respondent employed at Ottawa, Ontario, save and except registered graduate nurses, office staff, maintenance supervisor, dietary supervisor, recrealogist, department heads, persons above the rank of department heads, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (85 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	55
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	29
Number of ballots marked in favour of intervener	25

**1646-82-R:** Service Employees Union Local 204, affiliated with the AFL, CIO, CLC, (Applicant) v. Central Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, administrative assistants to the executive director, the administrator, the assistant administrator – Finance, assistant administrator – Patient Care and the director of personnel, persons regularly employed for not more than

twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (35 employees in unit).

Number of names of persons on list as originally prepared		35
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant		20
Number of ballots marked against applicant		11
Ballots segregated and not counted		4

**1652-82-R:** International Woodworkers of America, (Applicant) v. Merit Paper and Bag Company Limited, (Respondent).

Unit: "all employees of the respondent at Oshawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (40 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		41
Number of persons who cast ballots	38	
Number of ballots marked in favour of applicant		24
Number of ballots marked against applicant		14

**1666-82-R:** United Headwear, Optical and Allied Workers Union of Canada, Local 4, (Applicant) v. Imperial Optical Company Ltd., (Respondent).

Unit: "all laboratory employees of the respondent in its prescription laboratory at Ottawa save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, persons licensed by the Government of Ontario as Ophthalmic Dispensers and employed in that capacity, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant		13
Number of ballots marked in favour of intervener		0

**1798-82-R:** United Headwear, Optical and Allied Workers Union of Canada, Local 4, (Applicant) v. Imperial Optical Company Ltd., (Respondent).

Unit: "all laboratory employees of the respondent in its prescription laboratory at Oshawa, save and except foremen and foreladies, persons above the rank of foreman or forelady, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (4 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		3
Number of ballots marked in favour of intervener		0

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**1756-81-R:** The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local #58, Toronto, (Applicant) v. Harbourfront Corporation, (Respondent).



Unit: "all stage employees of the respondent in Metropolitan Toronto, save and except manager, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (4 employees in unit).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		1

### Applications for Certification Dismissed – No Vote Conducted

**0707-82-R:** The United Headwear, Optical and Allied Workers Union of Canada, Local 3, (Applicant) v. Biltmore/Stetson (Canada) Inc., Peat Marwick Limited, as Receiver and Manager of Biltmore Hats, a Division of Biltmore Industries Limited and Thorne Riddell Inc., Trustee of Biltmore Industries Limited, (Respondent) v. Hat Workers Union Local 82, of the United Hatters, Cap and Millinery Workers International Union, (Intervener). (104 employees in unit).

**1559-82-R:** Service Employees Union, Local 204 affiliated with SEIU, AFL, CIO (Applicant) v. Broadway Manor Nursing Home, (Respondent) v. Christian Labour Association of Canada, (Intervener). (40 employees in unit).

**1651-82-R:** Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL, CIO, CLC, (Applicant) v. Fiddick's Nursing Home Limited, (Respondent) v. Christian Labour Association of Canada, (Intervener). (33 employees in unit).

**1799-82-R:** The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local #58, Toronto, (Applicant) v. Canadian National Exhibition Association, (Respondent). (5 employees in unit).

**1805-82-R:** United Brotherhood of Carpenters & Joiners of America, Local 18, (Applicant) v. Beatty-Hall Construction Co. Limited, (Respondent). (4 employees in unit).

**1812-82-R:** Canadian Union of Public Employees, (Applicant) v. University Settlement Recreation Centre, (Respondent). (16 employees in unit).

**1837-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Kimberley Aluminum Products Ltd., (Respondent). (2 employees in unit).

**1861-82-R:** International Association of Heat and Frost Insulators and Asbestos Workers Local 95, (Applicant) v. W. Besterd Plumbing, Heating and Mechanical (1981) Ltd., (Respondent). (8 employees in unit).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**0569-82-R:** United Brotherhood of Carpenters and Joiners of America, Locals 18, 494, 675, 1256, 1316 and Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, (Applicant) v. Western Ontario Drywall Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of

Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in unit).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		12

**1033-82-R:** Canadian Paperworkers Union, (Applicant) v. Abitibi-Price Inc., (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all employees of the respondent in its Lakehead Woodlands Division who are engaged in Woods Operations on the limits and on the work sites of the respondent." (498 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared		500
Number of persons who cast ballots	285	
Number of ballots marked in favour of applicant		105
Number of ballots marked in favour of intervener		180

**1302-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Horseshoe Inn Motel operated by Diamond Motel (London) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at London Ontario, save and except supervisors and persons above the rank of supervisor." (24 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant		00
Number of ballots marked against applicant		14

**1436-82-R:** Energy and Chemical Workers Union, (Applicant) v. Union Gas Limited, (Respondent).

Unit: "all office and clerical employees of the respondent in the City of Sarnia, save and except assistant supervisors, those persons above the rank of assistant supervisor, sales staff, technicians, confidential secretaries to the operations manager and the sales supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (27 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		27
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		16

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1572-82-R:** United Brotherhood of Carpenters and Joiners of America Local 2486, (Applicant) v. Kamet Enterprises Limited, Aero Block & Precast Ltd., (Respondents) v. The Form Work Council of Ontario, (Intervener #1) Labourers' International Union of North America, Local 183, (Intervener #2).

**1790-82-R:** Canadian Union of Public Employees, (Applicant) v. Provincial Sanitation Services, (Respondent).

**1814-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Holiday Inn London City Centre and Tower of the Commonwealth Holiday Inns of Canada Limited, (Respondent).

**1881-82-R:** Canadian Union of Public Employees, (Applicant) v. The Stratford General Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

**1908-82-R:** Labourers' International Union of North America, Local 607, (Applicant) v. CEA Simon-Day Ltd., (Respondent). (*Withdrawn*)

**1909-82-R:** International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. Maple Painting & Decorating, (Respondent).

## SALE OF A BUSINESS

**1178-82-R:** United Electrical, Radio & Machine Workers of America, (UE), Local 563, (Applicant) v. Durham Metal Stampings & Assemblies Ltd., Comco Metal & Plastic Industries Ltd., A. G. Simpson Co. Limited, The Clarkson Company Limited ("Clarkson"), (Respondents) v. Comco Employees' Association, (Intervener). (*Withdrawn*)

## UNION SUCCESSOR RIGHTS

**1672-82-R:** Ontario Public Service Employees Union, (Applicant) v. The Ontario New Democratic Party Caucus, (Respondent). (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0610-82-R:** Irma C. Krippendorf, (Applicant) v. Service Employees International Union Local 183, (Respondent) v. Richard S. Bond, Administrator of Westgate Nursing Home Inc., (Intervener). (*Dismissed*)

**1234-82-R:** Peter Lacelle and others, (Applicant) v. International Union of Electrical, Radio and Machine Workers AFL, CIO, CLC, and its Local 547A, (Respondent). (*Dismissed*)

**1463-82-R:** M. Pottinger, (Applicant) v. Laundry and Linen Driver's Industrial Union Local 847, (Respondent) v. Temple Wire Products Ltd., (Intervener).

Unit: "all employees of Temple Wire Products Ltd., in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (*Granted*)

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	13	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		13



**1742-82-R:** Jean Marc Joanisse, (Applicant) v. The Retail, Wholesale and Department Store Union, AFL, CIO, CLC, and its Local 414, (Respondent). (*Dismissed*)

**1765-82-R:** Robert Calder, (Applicant) v. Canadian Union of Public Employees, Local 1217, (Respondent) v. Town of Collingwood, (Intervener). (*Dismissed*)

**1804-82-R:** Media Technicians' Association, (Applicant) v. Peel Board of Education, (Respondent) v. Canadian Union of Public Employees, (Intervener). (*Dismissed*)

**1862-82-R:** District of Parry Sound Child & Family Centre, (Applicant) v. Ontario Public Service Employees' Union, (Respondent). (*Granted*)

## REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

**1610-82-M:** Canada Forgings, A Division of Toromont Industries Ltd., (Employer) v. International Union, United Automobile, Aerospace, Agricultural Workers, Local 275, (Trade Union). (*Dismissed*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**1429-82-U:** Collingwood Shipyards a Division of Canadian Shipbuilding and Engineering Limited, (Applicant) v. Linda Laver, Margaret Lewin, Betty Weatherhead et al, (Respondents). (*Withdrawn*)

**1763-82-U:** Montgomery Elevator Co. Limited and National Elevator and Escalator Association, (Applicants) v. International Union of Elevator Constructors Local 96, Joseph P. Kennedy et al, (Respondents). (*Withdrawn*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

**1886-82-U:** Nicholls-Radtke & Associates Limited, (Applicant) v. The International Brotherhood of Electrical Workers, Local 773, and Douglas Ryan, et al (See Schedule "A" attached), (Respondents). (*Granted*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**2423-81-U:** United Brotherhood of Carpenters and Joiners of America, Local 249, (Complainant) v. R & H Doornekamp & Sons Ltd.; Doornekamp Engineers Contractors; Doornekamp & Sons Ltd., (Respondent). (*Withdrawn*)

**0020-82-U:** Welland Typographical Union, Local 927, (Applicant) v. Welland Evening Tribune, A Division of Canadian Newspapers Company Limited, (Respondent). (*Granted*)

**0417-82-U:** Food and Service Workers of Canada, (Complainant) v. Bond Place Hotel, (Respondent). (*Granted*)

**0429-82-U:** Food and Service Workers of Canada, (Complainant) v. Bond Place Hotel, (Respondent). (*Terminated*).

**0698-82-U:** Ontario Public Service Employees Union, (Complainant) v. Taylor Ambulance Service, (Respondent). (*Granted*)

**0773-82-U:** Food and Service Workers of Canada, (Complainant) v. Bond Place Hotel, (Respondent). (*Granted*)

**0850-82-U:** Labourers' International Union of North America, Local 1036, (Complainant) v. Reliable Maintenance, (Respondent). (*Withdrawn*)

**0928-82-U:** Food and Service Workers of Canada, (Complainant) v. Bond Place Hotel, (Respondent). (*Terminated*).

**1072-82-U:** Food and Service Workers of Canada, (Complainant) v. Bond Place Hotel, (Respondent). (*Dismissed*)

**1125-82-U; 1126-82-U:** Toronto Typographical Union Local No. 91, (Complainants) v. Tri-Graph Inc. and Tri-One Personnel, (Respondents) v. Group of Employees, (Objectors). (*Granted*)

**1179-82-U:** United Electrical, Radio & Machine Workers of America, (UE) Local 563, (Complainant) v. Durham Metal Stampings & Assemblies Ltd., Comco Metal & Plastic Industries Ltd., A. G. Simpson Co. Limited, The Clarkson Company Limited, ("Clarkson"), (Respondents). (*Withdrawn*)

**1334-82-U:** Abraham Mayne, (Complainant) v. Michael Seaward Local 8412 U.S.W.A., (Respondent). (*Terminated*).

**1371-82-U:** Virginia DeSantis, (Complainant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent). (*Dismissed*)

**1442-82-U:** George Lazenkas, (Complainant) v. United Food & Commercial Workers International Union, Local 1000A, (Respondent). (*Dismissed*)

**1532-82-U:** United Steelworkers of America, (Complainant) v. Fildebrandt Precision Industries Limited, (Respondent). (*Withdrawn*)

**1627-82-U; 1629-82-U:** Terry Davey, (Complainant) v. CUPE Local 16, (Respondent). (*Withdrawn*)

**1630-82-U:** Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Alltour Marketing Support Services Ltd., (Respondent). (*Withdrawn*)

**1678-82-U:** International Woodworkers of America, (Complainant) v. Merit Paper and Bag Company Limited, (Respondent). (*Withdrawn*)

**1679-82-U:** Labourers' International Union of North America, Local 183, (Complainant) v. J.D.S. Investments Limited, (Respondent). (*Withdrawn*)

**1684-82-U:** Hotels, Clubs, Restaurants and Tavern Employees Union, Local 261, Ottawa, Ontario, (Complainant) v. VS Food Services, (Kingston), St. Lawrence College, (Respondent). (*Withdrawn*)

- 1716-82-U:** Sudbury Mine Mill and Smelter Workers' Union, Local 598, (Complainant) v. Falconbridge Nickel Mines Limited, (Respondent). (*Withdrawn*)
- 1718-82-U:** Service Employees Union, Local 204, (Complainant) v. Central Hospital and Dr. Paul Rekai, (Respondent). (*Withdrawn*)
- 1753-82-U:** Peter George, (Complainant) v. Babcock & Wilcox Ind. Ltd., United Steelworkers of America Local 2859, (Respondents). (*Withdrawn*)
- 1777-82-U:** Commercial Workers Union, Local 486, chartered by: United Food and Commercial Workers International Union, (Complainant) v. Santa Maria Foods Limited and Jeffrey Davies and Sandy Ford, (Respondent). (*Withdrawn*)
- 1776-82-U:** Soad Massoud, (Complainant) v. Hotel, Restaurant and Cafeteria Employees, Union Local 75, George Pineau, (Respondent). (*Withdrawn*)
- 1780-82-U; 1781-82-U; 1782-82-U; 1783-82-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Bay Beverages Ltd., (Respondent). (*Withdrawn*)
- 1785-82-U:** Ontario Public Service Employees Union, (Complainant) v. Danver Ambulance Service Inc., (Respondent). (*Withdrawn*)
- 1800-82-U:** Health Office and Professional Employees, a division of Retail, Commercial & Industrial Union, Local 206, chartered by the United Food and Commercial Workers International Union, CLC, ADL, CIO, (Complainant) v. Sara Vista Nursing Home, (Respondent). (*Withdrawn*)
- 1826-82-U:** Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Complainant) v. Ken Carr Holdings Ltd. carrying on business as Pizza Delight, (Respondent). (*Withdrawn*)
- 1841-82-U:** Terry Davey, (Complainant) v. C.U.P.E., Local 16, (Respondent). (*Withdrawn*)
- 1846-82-U:** Paulo Moco, (Complainant) v. Bill Philips, (Respondent). (*Withdrawn*)
- 1847-82-U:** Retail Clerks Union, Local 409, (Complainant) v. Red Dog Inn of Fort Frances, Ltd., (Respondent). (*Dismissed*)
- 1848-82-U:** Robert Garvie, (Complainant) v. Local 67 of (The United Association of Journey-men & Apprentices of the Plumbing & Pipefitters) & Consolidated Plant Maintenance Ltd., (Respondent). (*Withdrawn*)
- 1863-82-U:** Christian Labour Association of Canada, (Complainant) v. Brucefield Manor Limited, (Respondent). (*Withdrawn*)
- 1879-82-U:** Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Complainant) v. 3-R Timber Inc., (Respondent). (*Withdrawn*)
- 1885-82-U:** International Brotherhood of Electrical Workers, Local 636, (Complainant) v. Welland Hydro Electric Commission, (Respondent). (*Withdrawn*)
- 1900-82-U:** Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Complainant) v. Bangkok Gardens Restaurant, (Respondent). (*Withdrawn*)



**1927-82-U:** Vincenzo Riccio, (Complainant) v. Teamsters Local Union 938, (Respondent). (*Withdrawn*)

**1928-82-U:** Samir Monsour, (Complainant) v. Ontario Taxi Association Local 1688 CLC, (Respondent). (*Withdrawn*)

**2175-82-U:** Leon Zawadzki, (Complainant) v. Energy and Chemical Workers Union Local 435 and Sterling Drug Ltd., (Respondents). (*Withdrawn*)

## **APPLICATIONS FOR RELIGIOUS EXEMPTION**

**1553-82-M:** Messaouda Danielle Boulakia, (Applicant) v. Hillel Academy Teachers' Association, (Respondent Trade Union) v. Ottawa Talmud Torah, (Respondent Employer). (*Dismissed*)

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**1851-82-M:** The Clarkson Company Limited as Receiver and Manager of D. A. White & Co. Limited, (Employer) v. United Steelworkers of America, Local 5297, (Trade Union). (*Granted*)

## **JURISDICTIONAL DISPUTES**

**0426-82-JD:** United Steelworkers of America, Local 4763, (Complainant) v. Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and Port Colborne Iron Works Ltd., (Respondents). (*Withdrawn*)

**0672-82-JD:** Port Colborne Iron Works Ltd., (Complainant) v. Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 736 and Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Respondents). (*Withdrawn*)

## **COLLEGES COLLECTIVE BARGAINING ACT**

**0711-82-M:** Ontario Public Service Employees Union, (Complainant) v. Sheridan College of Applied Arts and Technology, (Respondent). (*Granted*)

## **APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS**

**1103-82-M:** Cornwall Standard Freeholder, a Division of Canadian Newspapers Limited, (Applicant) v. International Printing and Graphic Communications Union, (Respondent). (*Terminated*).

**1489-82-M:** St. Peter's Centre, (Applicant) v. Ontario Nurses' Association, Local 156, (Respondent). (*Withdrawn*)

**1734-82-M:** The London Regional Art Gallery Board, (Applicant) v. The London Regional Art Gallery Employees' Union, Local 217 (Canadian Union of Public Employees), (Respondent). (*Withdrawn*)

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**1100-82-OH:** International Association of Machinists and Aerospace Workers, Lodge No. 771, (Complainant) v. Boise Cascade Canada Ltd., (Respondent). (*Dismissed*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**2165-81-M:** The Sheet Metal Workers International Association Local 47, (Applicant) v. Irvcon Roofing and Sheet Metal (Pembroke) Limited, (Respondent) v. Ontario Sheet Metal and Air Handling Group, (Intervener). (*Granted*)

**0274-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Operating Engineers Employer Bargaining Agency and Ellis-Don Limited, (Respondent). (*Granted*)

**0328-82-M:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Port Colborne Iron Works Limited, (Respondent). (*Withdrawn*)

**0746-82-M:** I.B.E.W. Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 1788, (Applicants) v. Ontario Hydro, (Respondent). (*Dismissed*)

**1197-82-M:** United Brotherhood of Carpenters and Joiners of America Local 2486, (Applicant) v. Roy Construction and Supply Company Limited, (Respondent). (*Withdrawn*)

**1453-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. D & L Bros. Construction Limited, (Respondent). (*Withdrawn*)

**1469-82-M:** Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. D & L Bros. Construction Limited, (Respondent). (*Withdrawn*)

**1514-82-M:** Ontario Allied Construction Trades Council, Labourers' International Union of North America, Local 607, (Applicant) v. The Electrical Power Systems Construction Association and Sudbury Mining Contractors Limited, (Respondent). (*Granted*)

**1555-82-M:** Sheet Metal Workers' International Association Local Union No. 537, (Applicant) v. Warren Mechanical Limited, (Respondent). (*Withdrawn*)

**1602-82-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. Abban Excavating Limited, (Respondent). (*Withdrawn*)

**1603-82-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. M.B.L. International Contractors Inc., (Respondent). (*Withdrawn*)

**1641-82-M:** International Association of Bridge, Structural and Ornamental Ironworkers Union, Local 759, (Applicant) v. Caledon Steel Erectors Ltd., (Respondent). (*Dismissed*)

**1725-82-M:** International Brotherhood of Boilermakers Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Union 128, (Applicant) v. E. S. Fox Limited, (Respondent). (*Withdrawn*)

**1737-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. D'Angelo Interior Contractors, (Respondent). (*Granted*)

**1739-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Readywall Ltd., (Respondent). (*Dismissed*)

**1744-82-M:** Labourers' International Union of North America Local 247, (Applicant) v. M. Sullivan & Son Limited, (Respondent). (*Withdrawn*)

**1795-82-M:** Labourers' International Union of North America, Local 837, (Applicant) v. Conview Forming Limited, (Respondent). (*Granted*)

**1796-82-M:** Labourers' International Union of North America, Local 837, (Applicant) v. John Tries Construction Limited, (Respondent). (*Granted*)

**1811-82-M:** International Union of Elevator Constructors, Local 50, (Applicant) v. Beckett Elevator Company Limited, (Respondent). (*Withdrawn*)

**1815-82-M:** Labourers' International Union of North America, Local 1036, (Applicant) v. Hardrock Mine Developers Limited, (Respondent). (*Withdrawn*)

**1816-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Paul Tremblay Construction Limited, (Respondent). (*Granted*)

**1822-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Acoustique Piche Inc., (Respondent). (*Withdrawn*)

**1825-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Dallas Concrete Forming Ltd., (Respondent). (*Withdrawn*)

**1844-82-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. Ellis Don Limited, (Respondent). (*Withdrawn*)

**1852-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Steinberg Inc., (Respondent). (*Withdrawn*)

**1853-82-M:** Operative Plasters' and Cement Masons' International Association of the United States and Canada Local 598, (Applicant) v. Metro Concrete Floor Inc., (Respondent). (*Withdrawn*)

**1859-82-M; 1858-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Teskey Construction Company Limited, (Respondent). (*Withdrawn*)

**1865-82-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Toronto Construction Association Lancione Contracting Company Limited, (Respondents). (*Withdrawn*)

**1866-82-M:** Labourers' International Union of North America, Local 1081, (Applicant) v. A. Gorgi Masonry (1976) Limited, (Respondent). (*Withdrawn*)

**1871-82-M:** International Union of Operating Engineers Local 793, (Applicant) v. Inverleigh Construction Limited, (Respondent). (*Withdrawn*)



**1892-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Cooper's Crane Rental Ltd., (Respondent). (*Withdrawn*)

**1922-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. M. Sullivan & Sons, (Respondent). (*Withdrawn*)

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**2026-81-M** International Union of Elevator Constructors, Local #50, Applicant, v. **Beckett Elevator Company Limited**, Respondent, v. National Elevator and Escalator Association, Intervener

Construction Industry Grievance - Reconsideration - Prior Board decision finding Union and Employer Association had no authority to enter into internal grievance settlement procedure - Application for reconsideration denied

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members O. Hodges and J. Wilson.

**DECISION OF THE BOARD;** March 17, 1983

1. This is a request for reconsideration of a decision of the Board dated September 21, 1982 (now reported at [1982] OLRB Rep. Sept. 1244). The request is contained in a letter from counsel for the applicant union dated October 13, 1982. That letter reads as follows:

“Further to receipt of the Board’s decision dated September 21, 1982 our clients, the International Union of Elevator Constructors, Local 50, request the Board to reconsider its decision on the grounds which are set out hereafter.

The first basis for requesting such reconsideration is the fact that the Board came to conclusions of fact without hearing evidence or receiving an agreement of the parties in relation to the following issues. In paragraph 2 the Board made the observation that ‘Beckett is not a member of the N.E.E.A., nor is it a willing participant in this bargaining process,’ and further, in the same paragraph, that ‘as the two rival associations were unable to compose their differences, the Minister redesignated the N.E.E.A. as the sole employer bargaining agency. It further appears that the N.E.E.A. is dominated by four large well-established national companies: Dover, Montgomery, Otis, and Westinghouse. Many of the other companies represented for collective bargaining purposes by the N.E.E.A. .... are members of the C.E.C.A., the rival employer organization.’

It is apparent from our notes that there was never any Agreed Statement of Fact to lead to the above conclusions and there was certainly no evidence from which the Board could come to such a conclusion. If anything the gratuitous comment was thrown out by one of the counsel that Beckett in fact was larger than one of the above-named companies in the Province of Ontario. It would seem from much of what the Board stated later in its decision that the improper perception that Beckett was in the position of a ‘poor defenceless individual employer,’ was based upon the improper conclusions arrived at in paragraph 2.

Further on page 3 the Board states that 'Moreover, if some firms are regularly on the 'receiving end' of such transfers, or must absorb them at a commercially inconvenient time, it does not take much imagination to envisage the friction which may arise...'.

Again there was no evidence to lead the Board to making such a conclusion and in any event the conclusion is clearly incorrect as employers do not have to absorb more men than they can properly employ. There was no Agreed Statement of Fact, or evidence, to lead to the conclusion that Beckett, or any other employer, have been forced to absorb excess employees.

In paragraphs 5 and 6 of the decision, the Board seems to be contradicting itself in that it has stated that there was no evidence that individual employers, bound by the agreement, have any specific representation on the J.I.C. In paragraph 6, the Board states that the J.I.C. was composed of representatives of the Union, the N.E.E.A., and two representatives from Dover and Otis. The latter are individual employers and thus the contradiction is apparent.

In paragraph 16 of the decision, the Board states that 'an individual employer like Beckett is unrepresented on the decision-making body'. It is submitted that it would be wholly unreasonable to provide for an internal settlement procedure which places the employer on the decision-making body when its own actions are being contested. The employer has the right, as exercised in the present case, of appearing before the decision-making body and making whatever representations it wished.

It is apparent from the decision that the Board did not consider the argument that since Beckett had participated in the whole procedure it was estopped from then complaining about such procedure. If Beckett considered that the procedure at the J.I.C. was improper and contrary to the terms of the agreement and/or the Ontario Labour Relations Act then it could have acted prior to attorning to the J.I.C.'s jurisdiction.

It is submitted that the parties to a collective agreement can quite properly negotiate any item and term of condition put forward by either party. As was submitted in the instant case the parties to the industry agreement have been referring the grievances to the J.I.C., or its equivalent, for over 50 years. This is no different than a term included in numerous construction industry agreements referring jurisdictional disputes to the Impartial Jurisdictional Disputes Board in Washington. It is respectfully submitted that the decision in the instant case renders meaningless numerous other provisions in other collective agreements where similar internal boards are set up.



It is submitted that if any of the conclusions of fact which the Board came to, without hearing evidence, are to be made then they should be made after evidence had been heard on the second complaint namely File No. 2582-81-U and properly determine whether or not Beckett's accusation of unfair representation has any substance. The Board, by taking the approach it did, has effectively disposed of the legal issues in that complaint.

In addition to all of the arguments previously made and in light of the above representations, it is respectfully requested that the Board reconsider its decisions and find that Beckett Elevator is bound by the decision of the J.I.C. and that such is enforceable subject to any conclusions of fact and law which the Board may come to after hearing Board File No. 2582-81-U.

In light of the fact that November 1st has been set by the Board for a continuation of the Section 124 it is requested that such date be adjourned pending reconsideration."

The request for a reconsideration is supported by the intervener in a letter dated December 17, 1982:

"We have now had an opportunity to fully review the Board's award and the union's application for reconsideration of this matter. NEEA hereby requests that this matter be reconsidered on the following grounds:

1. The Board bases its decision or its answer to the following question:

'Did the Union and the NEEA have a right founded in statute to negotiate this internal procedure that would bind all employers under the collective agreement?'

The fact that the J.I.C. had the authority to act and issue a decision that was 'final and binding' was agreed to by each of the parties at the hearing and subsequently confirmed in the following written submissions which read, in part, as follows:

- (i) Intervenor, National Elevator and Escalator Association submission - May 11, 1982, page 1:

'All of the parties agreed that the Joint Industry Committee (J.I.C.)

(a) as a body is validly constituted,

(b) may hear grievances referred to it in accordance with the collective agreement, and

(c) may make decisions on grievances referred to it and those decisions are final and binding on the parties.'

(ii) Respondent, Beckett Elevator, May 18, 1982:

'With regard to the submissions of the Intervener Association, the Respondent Company agrees that at the hearing, all parties did, in fact, agree to the propositions concerning the J.I.C. outlined on page 1 of the Association's submissions as items (a), (b) and (c).'

Given this fact as agreed by the parties, the Board's decision is perverse.

2. The Board refused to deal with the issues that was put directly before it, that being:

'In the situation where all the parties to the collective agreement, the Union, N.E.E.A. and the Employer agree that the decision arising out of the internal grievance procedure is 'final and binding', can one of the parties seeking to enforce that decision come before a Board of arbitration, in this case, the Ontario Labour Relations Board, pursuant to s.124 of the *Ontario Labour Relations Act* and have the decision enforced?'

The Board chose instead to deal with the question as set out in paragraph 1 above which was both immaterial and unnecessary to the determination of the real question set out above in this paragraph. The Board thereby exceeded its jurisdiction.

3. At the hearing there was no evidence called or heard. There was no agreed to statement of facts placed before the Board.

Each of the parties made certain allegations as to what the facts were and although there appeared to be agreement on a number of indisputable items such as:

- (i) the grievance
- (ii) the relevant collective agreement
- (iii) the submission to the J.I.C.
- (iv) the J.I.C. decision

there was substantial conflict in most other facts as alleged by each of the parties.

The first sentence of paragraph 2 of the award, which reads:

'certain matters are not in dispute' is simply not accurate as it relates to all of the facts set out by the Board in its award. The

union in its application for reconsideration has set out numerous examples where the Board has accepted as fact the allegation of one of the parties as opposed to the allegations of another party without hearing any evidence on which to base such a decision.

4. It is clear from s.124 of the *Ontario Labour Relations Act* that the Respondent Beckett Elevators had a statutory right to refer the grievance to arbitration without first submitting to the jurisdiction of the J.I.C. under the collective agreement grievance procedure. Beckett, however, chose to voluntarily submit to the jurisdiction of the J.I.C. to determine the matter rather than referring it to the Ontario Labour Relations Board pursuant to s.124. The effect of the Board's decision dated September 21, 1982 is that Beckett is not bound by the decision of the J.I.C., in spite of the fact that Beckett submitted to the J.I.C.'s jurisdiction. It is our respectful submission that the Ontario Labour Relations Board has no authority or jurisdiction to overrule the decision of a body which gained its jurisdiction to decide the matter, by the voluntary submission of the parties to that jurisdiction.

All of which is respectfully submitted."

2. The basis for the Board's decision in this matter is fully set out in its written reasons. It is unnecessary to fully reiterate those reasons here. It suffices to deal with the points which counsel have raised. For the purpose of completeness, however, we note once again the provisions of the collective agreement and the statute which gave rise to comment in the initial decision:

#### "Article 14

### GRIEVANCE AND ARBITRATION

14.01 Any difference or dispute regarding the application or interpretation of this Agreement or Local Agreements shall be settled locally between the Local Union and the Employer. Upon receipt of a written grievance the Employer Representative and the Union Representative shall meet within five (5) working days to settle the dispute. *In the event the matter cannot be settled on a local basis, then either the Union or the Employer Industry Committee which it is hereby understood and agreed shall have the power to enforce its decision by mutual consent for protection of the public and the entire elevator industry.*

Section 143. Where an employer bargaining agency has been designated under section 139 or accredited under section 141 to represent a provincial unit of employers,

- (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, *but only for the purpose of conducting bargaining and concluding a provincial agreement...*"

[emphasis added]

3. Counsel are correct in their submission that there was no agreed statement of fact in this case, in the sense of a written document signed by the parties setting out the matters upon which they were agreed. There seldom is in Labour Relations Board proceedings where there is less formality in pleading and limited opportunity for pre-hearing discovery. However, even in the absence of a formal written statement of agreed facts it is common practice for the Board at the opening of the hearing to ask the parties to outline the nature of their respective positions, in order to identify the areas of agreement or disagreement and establish the context in which the dispute arises. That was the practice followed in this case. All counsel were invited to sketch in the background. No one objected to this procedure, and no one insisted upon evidence being led on matters which were not really in dispute, and in some cases, not strictly relevant to the issues to be determined. After outlining their respective positions all parties were content to move directly to argument, and did so. No one sought to lead or demanded evidence on any of the matters which had been raised.

4. An example or two will illustrate what we mean. Both at the hearing, and in his request for reconsideration, counsel for the union asserted that "the parties to the industry agreement have been referring the grievances to the J.I.C., or its equivalent, for over fifty years". At the hearing, he also indicated that the J.I.C. had rendered valuable service to the industry. No doubt it has; and the Board acknowledged that to some extent in paragraphs 9 and 17 of its decision. But there was no evidence led about the longevity of the J.I.C., its expertise or utility. This, like the submission concerning the rivalry between the two employer associations, forms part of the background of this case which was not (and is not) denied. Indeed, while initially questioning the relationship of this J.I.C. to Beckett because of its alleged different status prior to province-wide bargaining, counsel for Beckett conceded that the concept of an "internal board" was a useful one. In this, and other matters, the parties did not indicate any disagreement. That is why paragraph 2 of the Board's decision notes that "certain matters are not in dispute".

5. Similarly, the submission was made that Dover, Montgomery, Otis and Westinghouse were the dominant employers in the N.E.E.A., and that Beckett was not a member because of its prior allegiance to a rival association. None of this was questioned at the time, and it is interesting to note (as counsel for Beckett pointed out) that the representatives of the N.E.E.A. who signed the collective agreement do indeed come from Dover, Montgomery, Otis and Westinghouse. That is why the Board indicated that it "appears" that the N.E.E.A. is dominated by them – an inference which was not, and is not questioned. We also note further that the employer representatives on the J.I.C. were from Dover and Otis, and, there is no evidence that Beckett had any input into their selection. Again, that is consistent with the suggestion that these companies are important members of the N.E.E.A. On the other hand, no one suggested that Beckett is a member. Counsel for the union submits that it would be



anomalous if Beckett appeared on a J.I.C. body assembled to consider Beckett's own actions, but, in so doing, merely confirms the Board's view of the nature of the J.I.C. as a body created by, and representing, the designated bargaining agencies who concluded the collective agreement – an impression entirely consistent with its composition, not questioned at the hearing before this Board, and still not denied.

6. It is said by counsel for the union that the provision creating the J.I.C.

“is no different than a term in numerous construction industry agreements referring jurisdictional disputes to the Impartial Jurisdictional Disputes Board in Washington.”

It is submitted that:

“the decision in the instant case renders meaningless numerous other provisions in other collective agreements where similar internal boards are set up.”

There is no evidence to support either of these propositions, but, in the Board's experience, we have encountered collective agreements which refer to the I.J.D.B. and agreements which provide for “J.I.C.'s” similar to the one here in question. We do not need evidence to support counsel's submissions as to the existence of other J.I.C.'s or the I.J.D.B. These are matters of general knowledge in the industrial relations community (although it is less obvious why we should equate the two bodies when their purpose and composition may be different, and when the role of the I.J.D.B. is expressly recognized in section 91, while the role of the J.I.C. appears to be restricted by section 143). By the same token, the existence of two employer associations in the elevator industry is not only a matter of general knowledge in the industry, but is reflected in the Ministerial designation by virtue of which the N.E.E.A.'s role in bargaining and on the J.I.C. (hence its refusal to abide by the J.I.C. opinion) and there is no reason to question this submission. The application under section 124 was, after all, initially scheduled to be heard together with Beckett's allegation under section 151 that in representing Beckett the N.E.E.A. had acted in a manner that was arbitrary, discriminatory or in bad faith. Nor was there any question about the fact that Beckett was not a member of the N.E.E.A. And at no time did the Board harbour a perception that Beckett was a “poor defenseless individual employer”, nor would the Board's perception in this regard matter in any event. The fact is that no evidence was led on these matters because no one considered it necessary at the time. The focus was on the legal and interpretation question which formed the substance of the parties' dispute. That is why the parties proceeded directly to argument.

7. It is said that the Board declined jurisdiction by failing to give effect to and enforce a J.I.C. determination which the union, the N.E.E.A., and Beckett allegedly conceded was “final and binding”. It is asserted that the Board “asked itself the wrong question” when it went on to consider whether the statute permitted the union and employer to negotiate a procedure controlled by the N.E.E.A. which could impose a binding settlement of a grievance upon an individual employer bound by the agreement only by virtue of the statute and the N.E.E.A.'s status as its designated bargaining agent. It is further submitted that the Board is without jurisdiction under section 124 to

do anything other than “rubber stamp” and enforce the J.I.C. decision because a submission was made to the J.I.C. under Article 14 of the collective agreement which resulted in a “binding” resolution of the parties’ dispute.

8. There are a number of difficulties with these arguments.

9. We leave aside whether these issues are “jurisdictional” in an administrative law sense, whether the Board is compelled to give effect to every agreed contractual interpretation submitted to it, and whether the agreement of the parties resolves any question about the legal foundation and requirement for direct enforceability of the J.I.C. decision, whatever it might be, and whatever the disputed clause in the collective agreement might actually provide. We need not speculate. However, while we do not ignore the equities of the situation here, there may well be some argument to be made about the distinction between some oral concession Beckett may have made, and the legal enforceability of the J.I.C. decision.

10. The real problem in this case, however, is that although counsel for Beckett did indeed submit that the J.I.C. decision was “binding”, he did *not* concede that Beckett was bound to abide by it. On the contrary, Beckett refused to give effect to the J.I.C. ruling (hence, the need for the union’s section 124 application), and before the Board, counsel refused to agree that the decision was enforceable. Beckett’s position was curious and contradictory, and, whatever else might be said of it, the company was not acknowledging itself to be “bound” by the J.I.C. decision in the usual sense in which that word is used. And as the Board noted in paragraph 18 of its decision dated September 21, 1982, if under Article 14 of the agreement the J.I.C. only has power to enforce its decision “by mutual consent”, that consent was lacking before the Board.

11. The Board acknowledges that it should usually try to accommodate the agreement of the parties, and that it is odd to conclude that it should hear the merits of the case against a respondent when that party’s counsel has purportedly indicated that the case should be disposed of in accordance with the “final and binding” opinion of someone else. Moreover, to put the matter colloquially, “the Board is not looking for work”. If the parties are able to agree on a solution acceptable to them, there are strong practical reasons why the Board should endorse it. But have the parties so agreed in this case, and can we merely endorse their agreement? We have no evidence and there is no submission that prior to the Board hearing the parties had ever agreed that they would be bound by the J.I.C. decision. Certainly, nothing in writing to that effect was put before the Board, and whatever else may be said of Beckett’s submission, there was no agreement before this Board that the J.I.C. decision was enforceable. On the basis of what we had before us there was no basis for concluding that there was any previous agreement as to enforceability either. Yet by this collective agreement enforceability appears to be contingent upon mutual consent, and as we read section 143 of the Act, that consent must come from Beckett. That consent was missing, for what might ordinarily follow from the use of the words “final and binding” was immediately contradicted by a rejection of the suggestion that the J.I.C. decision was enforceable. On what was put before the Board, we would not conclude that Beckett was resiling from some *previously expressed* agreement, and in the circumstances we determined that justice would best be served by hearing the case on its merits. That solution would avoid any residual doubts or confusion about what was alleged to be a preliminary

issue, and would give all parties a full opportunity to present their positions on the substantive interpretation issue which gave rise to this problem in the first place. It also bears repeating that, under section 124, the Board has authority to hear a grievance notwithstanding the grievance-arbitration procedure in the collective agreement which, in this case, encompasses the reference to the J.I.C.

12. It is argued that by attending before the J.I.C., Beckett was "attorned" to its jurisdiction and is estopped from questioning the correctness of the J.I.C.'s determination. It is argued that, in the circumstances, the Board should simply endorse and enforce that decision. It is said that in its decision of September 21, 1982, the Board failed to consider this argument.

13. In the first place, we do not think that the estoppel argument was not put in quite this way. It was argued that the J.I.C. decision, in itself, estopped the respondent employer from contesting the merits of the grievance; and further, that by conceding that the J.I.C. decision was "final and binding" (see paragraph 10 of the Board decision), Beckett was precluded from arguing that it was not enforceable. We do not think the applicant made the submission that appearance before the J.I.C., in itself, would foreclose a later complaint. However, lest the Board has missed or misunderstood this argument, we will deal with it here.

14. We note first that recourse to the J.I.C. is not voluntary. Disputes must be referred to the J.I.C. unless the parties agree to waive that procedure. Here they did not, so that Beckett was put in the position of attending or risking the outcome if its side of the case was not presented. It is rather technical to suggest that a layman who attends before a lay body but clearly does not concur in or accept the results of its deliberations, would be taken to have waived his right to protest or require that his legal rights be determined in a forum provided by statute. This is especially so when (for the reasons set out in the Board's earlier decision) the J.I.C. was precluded by statute from imposing a binding decision, and the language of Article 14 itself appears to make enforcement contingent upon "mutual consent". In the circumstances, we are reluctant to infer that attendance at the J.I.C. meeting without more, confers upon it a jurisdiction which it would not otherwise have. We do not know what was said or done by Beckett on this or other occasions, or whether there was any conduct apart from attending the J.I.C. Meeting or the equivocal submissions of counsel before us, from which consent to be bound by its decision might be inferred. No evidence was led on these matters, nor did any party seek to do so. The circumstances here do not warrant the conclusion that Beckett agreed unequivocally to be bound by, and would implement, whatever the J.I.C. decided. Even the equivocal and contradictory concession made on behalf of Beckett by its counsel did not go this far.

15. For the purposes of this case we need not speculate on the factual or contractual circumstances which might prompt the Board to give binding effect to a body such as the J.I.C., nor should our decision be interpreted as a signal that the Board is anxious to deal with problems which traditionally have been, and probably should be, resolved in another less formal forum. But we do not think that this J.I.C., under this agreement, in these circumstances, has given an interpretation of the parties' collective agreement which the Board must merely enforce. Nor do we see how we can avoid considering section 143 of the Act which, in our view, does not contemplate the



role, vis a vis, individual employers and grievances, which the N.E.E.A. and the union assert is exercised by the J.I.C.

16. For the foregoing reasons, the original decision of the Board is affirmed, the application for reconsideration is dismissed, and the case should be scheduled for hearing on its merits. The matter is referred to the Registrar for this purpose.

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**2339-82-R** Lumber and Sawmill Workers' Union, Local 2295 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. BioShell Inc., Respondent, v. Canadian Paperworkers Union, Intervener, v. Group of Employees, Objectors

**Certification – Membership Evidence – Practice and Procedure – Representation Vote – Application by way of intervention filed prior to terminal date of applicant's application – Applicant seeking regular vote and intervener requesting pre-hearing vote – Both unions demonstrating membership support in excess of 55 percent – Board treating intervener's application as made on same date as applicant's – Treating intervener's application as requesting regular vote and directing three-way vote**

**BEFORE:** Pamela C. Picher, Vice-Chairman, and Board Members W. H. Wightman and Stewart Cooke.

**APPEARANCES:** *L. C. Arnold, P. Falzone and Marcel Lacroix for the applicant; W. S. Cook, G. P. Metsala, G. Bellefeuille and Ross Pirrie for the respondent; David Watson and Andrew Foucault for the objectors.*

**DECISION OF THE BOARD;** March 21, 1983

1. This is an application for certification.
2. There are two applications for certification before the Board: one filed by the applicant and one filed by the intervener, The Canadian Paperworkers Union.
3. The Board is satisfied that both the applicant and the intervener are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Nellie Lake, Ontario save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. At the hearing counsel for the applicant raised an objection relating to the membership evidence filed by the intervener.



6. The applicant filed its application for certification on February 10, 1983. It did not request a pre-hearing vote. In the normal course, the Board fixed the terminal date for the application as February 24th. The terminal date is the date by which all evidence of membership and objection must be received by the Board. On February 24th, the C.P.U. filed an application for certification by way of intervention. In contrast to the applicant, the intervener requested a pre-hearing vote.

7. Section 103(3) provides the Board with substantial discretion in dealing with an application for certification that is filed with the Board on behalf of employees in a bargaining unit subsequent to the filing of another application for certification relating to any of the same employees but prior to the Board issuing a final decision on the first application. Section 103(3) provides as follows:

103.-(3) Notwithstanding sections 5 and 57, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit ... and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification ... is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application.

8. When a subsequent application is filed with the Board on or before the terminal date set for a previously filed application for certification, the Board, as in this case, regularly exercises the discretion set out in section 103(3)(a) and treats the subsequent application as having been made on the date of the making of the original application.

9. Both the applicant and the intervener filed with the Board, as of the terminal date of February 24th, membership evidence on behalf of more than fifty-five percent of the employees in the bargaining unit on the applicant's application date. Counsel for the applicant, however, maintains that the only membership evidence that should be counted by the Board for the intervener is the membership evidence that it had obtained by the applicant's application date of February 10th. At that point the intervener had obtained membership evidence on behalf of less than thirty-five per cent of the employees in the bargaining unit.

10. The objection of counsel for the applicant may be summarized by the following thought progression which counsel asks the Board to accept:

- a. On the applicant's terminal date, the intervener filed an application for certification by way of intervention in which it requested the taking of a pre-hearing vote.
- b. The Board, in the normal course and having regard to the provisions of section 103(3)(a), treated the intervener's application as having been made on the date of the applicant's application, that is, February 10th.
- c. The intervener requested a pre-hearing vote. The provisions of section 9 of the Act, therefore, become relevant. Section 9 provides as follows:

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union *at the time the application was made*, the Board may direct that a representation vote be taken among the employees in the voting constituency.

• • •

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 792).

[emphasis added]

- d. When the Board processes an application for certification which requests a pre-hearing vote, the Board, under section 9(2) of the Act, assesses the records of the union and employer to determine whether not less than thirty-five per cent of the employees in the voting constituency were members of the trade union *at the time the application was made*.
- e. In the circumstances of this case, having regard to the exercise of the Board's discretion under section 103(3)(a) of the Act, the

intervener's application has been deemed to have been made on February 10th, the date of the applicant's application for certification, rather than February 24th, the date of its own application.

- f. Accordingly, counsel for the applicant argues, the Board must assess whether the intervener had membership evidence of not less than thirty-five per cent as of February 10th because that is the date upon which the intervener's application has been deemed to have been made rather than on February 24th, the actual date of its application for certification. The applicant's counsel maintains that since the intervener did not have thirty-five per cent membership support on February 10th, the intervener is not entitled to a vote at the same time as the applicant and its application for certification must stand down to be heard *after* the applicant's.

11. The applicant's position is based on the assumption that when the Board entertains two applications for certification pursuant to its discretion under section 103(2)(a) of the Act, it will maintain a hybrid situation and simultaneously consider one as a regular application for certification if that is the way it was filed with the Board (the applicant's in this case) and the other as an application requesting a pre-hearing vote if it was filed as such (the intervener's in this case). To do so, however, would create an anomalous result in the assessment of the membership support required for a representation vote and in the timing of the determination of the bargaining vote and in the timing of the determination of the bargaining unit. In the hybrid situation, to become entitled to a representation vote, the applicant union, because it filed a regular application for certification, would require membership support from not less than forty-five per cent of the employees in the bargaining unit while the intervener, because it requested a pre-hearing vote, would need only thirty-five per cent support to become entitled to the same representation vote. Moreover, for the applicant, the vote would be a vote of the employees in a *bargaining unit* already determined by the Board to be appropriate. Pursuant to section 9(2), however, the vote for the intervener would be a vote of employees in a voting constituency with the bargaining unit determination to be made according to section 9(4) after the representation vote. In the Board's assessment, anomalies of this sort were not anticipated by the Legislature when it clothed the Board with its discretion under section 103(3)(a) of the Act. The Board cannot order a single representation vote that may be characterized for one union as a regular representation vote, to which certain procedures and sections of the Act apply, and for the other as a pre-hearing vote to which certain other procedures and sections of the Act apply.

12. When an application for certification requesting a pre-hearing vote is filed with the Board by the terminal date fixed for a previously filed application for certification in respect of which no request for a pre-hearing vote has been made, the Board, if it exercises its discretion under section 103(3)(a) of the Act and hears the two applications together, will treat the subsequent application as a regular application for certification. The two applications will then proceed on the same footing and under the same sections of the Act.

13. In the instant matter, therefore, the Board views both applications for certification as regular applications for certification rather than one as a regular application and the other as one requesting a pre-hearing vote. The relevant date for assessing the membership evidence filed by each union, therefore, is the terminal date of February 24th which was fixed following the Board's receipt of the applicant's application.

14. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the applications were or were deemed to have been made, were members of both the applicant and the intervener on February 24, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Accordingly, both the applicant and the intervener are entitled to participate in a representation vote.

15. The Board orders, therefore, that a representation vote be taken forthwith among the employees in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

16. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener or no union in their employment relations with the respondent.

17. The matter is referred to the Registrar.

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**1333-82-U Phillip Wayne Bradley, Complainant, v. Canadian Paperworkers Union, Local 212, Respondent**

**Duty of Fair Representation – Unfair Labour Practice – Discharged employee not advised of right to grieve – Union not responding to inquiries by grievor as to action taken on his behalf – Whether clause in collective agreement that union will not represent discharged probationary employees contrary to duty of fair representation – Board finding union violated Act**

**BEFORE:** Corinne F. Murray, Vice-Chairman.

**APPEARANCES:** *M. Bendel and Phillip Wayne Bradley for the complainant; Wilfred C. Oliver, Roger N. Delage and Floyd A. Dupras for the respondent.*

**DECISION OF THE BOARD; March 17, 1983**

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondent contrary to the provisions of section 68 of the Act.

2. The complainant alleged that the respondent acted in an arbitrary way because its officials were “unresponsive” to his inquiries regarding his situation of being terminated by Domtar Inc. (Fine Papers) (hereinafter referred to as “Domtar”). The complaint filed by the complainant states that:

On or about September 1981 to present the grievor was dealt with by Canadian Paperworkers Union, Local 212 of the respondent contrary to the provisions of section 68 of the Labour Relations Act in that . . . (it) did refuse or neglect to provide any representation to the grievor when the grievor was dismissed from his employment with Domtar Inc. in September 1981. The grievor has had no response to his persistent attempts since September 1981 to find out why no steps have been taken by the Respondent to represent him.

It was further alleged that:

The grievor has communicated on several occasions with officers of the respondent without ever receiving a substantive response. The grievor has also communicated with similar effect with the President of the International. The grievor's solicitor has received no reply to his letter to the respondent.

The respondent denied that a breach of section 68 has occurred.

3. The complainant was terminated on or about September 11, 1981. He had been hired as a Spare Crewman at Domtar's Cornwall plant on June 23, 1981. Prior to this period of employment Mr. Bradley had been intermittently employed by Domtar at its Cornwall plant since September of 1973 as follows:

Sept. 11/73	Hired on Space Crew
Nov. 17/73	Laid off for lack of work
Dec. 26/73	Reinstated
Jan. 11/75	Laid off for lack of work
Aug. 15/75	Did not wish to return
June 16/76	Rehired as a Student
Sept. 4/76	Returned to school
Dec. 21/76	Rehired for Christmas period
Jan. 8/77	Returned to school
May 22/77	Rehired as a student
Sept. 10/77	Returned to school

This history is important because one of the contentious features of this matter is whether Mr. Bradley was a "probationary employee" at the time of his discharge and whether the obligations of the respondent would be affected by whether he was a probationary employee or not. Part of the respondent's defence is that the complainant was probationary at the time of his termination, and therefore the respondent's power or obligation under the collective agreement to represent Mr. Bradley is limited. At the time of Mr. Bradley's termination there was a collective agreement between Domtar Inc. and the Canadian Paperworkers Union, C.L.C. Locals 212 and 338 effective until April 30, 1984. The respondent interpreted section 4(b) of that collective agreement only to permit the respondent "to take the matter up" with management and "discuss it" outside the grievance procedure. The full text of section 4 is as follows:

#### SECTION 4 - MEMBERSHIP

- a) Any employee, eligible for membership in accordance with Section 2 of this Agreement who is now, or who should after this date become a member in either Local Union shall, as a condition of continued employment, maintain membership in good standing in the appropriate Local.

Except for non-payment of dues the application of this provision will be subject to the grievance procedure.

- b) New employees, including Summer replacements eligible for membership in one of the signatory Unions, shall as a condition of employment, join such Union after thirty (30) days and will serve a probationary period of ninety (90) days and after the first thirty (30) day period, the Union shall represent such employees in every capacity except for discharge and lay-off.
- c) The Union shall make available to the Management monthly a list of members in arrears showing to what extent arrears are owing. Suspension of employees for arrears is conditional on one week's notice of such arrears having been provided to the Company, in accordance with this paragraph.

- d) The Cornwall Mill of Domtar Fine Papers Group, through its Local Management will cooperate with the Local Unions in every legal and proper manner to assist in obtaining and retaining members.

Mr. Bradley acknowledged in testimony that when he was hired in June of 1981 he was advised by Domtar officials that he would be on probation for 90 days and during that time would be under constant and steady work reviews. Aside from section 4(b) there is no other provision in the collective agreement explicitly stating that employees must be on probation for 90 days. There is no provision which gives management complete discretion to discharge probationary employees nor is there any provision explicitly denying probationary employees the opportunity to file a grievance.

4. There is little dispute regarding the facts as described by Mr. Bradley and two of the three witnesses for the respondent. The third witness gave largely hearsay evidence and the Board has not given it any weight. Domtar did not appear at the hearing. On September 7, 1981 Mr. Bradley was working as a 5th hand on a 6-person crew assigned to operate No. 5 Papermachine. Roger Delage, one of the respondent's witnesses, was the Machine Tender (the most senior crew member) for No. 5 Papermachine that day. At the time of the incident he was Past President of the respondent union and held no official position with the respondent. After completing some assigned work between 6:30 a.m. and 10:20 a.m., Mr. Bradley announced to the crew members standing around that he was going to the cafeteria for a drink. Mr. Bradley said that the crew was standing around and he had no more assigned work at the time because No. 5 was "down" due to a lack of steam. It is clear he did not ask for permission to leave his work area. On the way to the cafeteria he was joined by the 6th hand, Mark Shaver, on the same machine. While in the cafeteria, he noticed Mr. Wallace, his superintendent, glaring at them. Mr. Bradley was apparently aware that he was doing something he should not have been doing by being in the cafeteria at this time because he claims he spent a good deal of his time there trying to convince Mr. Shaver they should go back to their work area. After they had returned to their work area, Mr. Wallace "stormed" up to Mr. Bradley and Mr. Shaver and told them to get down to his office immediately. Mr. Bradley said that when they went to Mr. Wallace's office, Mr. Wallace began screaming and swearing, becoming red in the face. The meeting concluded with both Mr. Bradley and Mr. Shaver being ordered back to their work area to sweep the floor. Mr. Bradley acknowledged that while sweeping the floor was a normal part of his duties, he considered the specific direction that he sweep the floor a "slur". Mr. Bradley acknowledged he was snickering as he left Mr. Wallace's office and this was adversely commented upon by the Acting Foreman who had been present at the meeting. Mr. Bradley said he snickered out of nervousness.

5. Later that day (at approximately 12 noon) an Acting Foreman ordered Mr. Bradley and Mr. Shaver back to Mr. Wallace's office. Mr. Wallace presented Mr. Bradley with an inter-office memo (Exhibit 2) which said:

On September 8, 1981 Mr. Philip Bradley was found in the Cafeteria at 10:20 a.m. doing absolutely nothing except drinking from a milk container and talking to someone at a table.



#5 P.M. was down and trying to get started up. I observed this man for 10 minutes just standing around talking.

There have been other occasions when this man has not performed his duties but stood idly by.

“G. Wallace”

He also handed Mr. Bradley a “tick sheet” whereon Mr. Wallace had written that Mr. Bradley was “one of the lousiest employees”. The “tick sheet” was not produced in evidence. After receiving these documents, Mr. Bradley and Mr. Shaver were ordered out of Mr. Wallace’s office.

6. It appears from both Mr. Bradley’s evidence and the evidence of Mr. Delage that when Mr. Bradley returned to his work area, he expressed his dissatisfaction with Exhibit 2 and showed it to the whole crew, including Mr. Delage. Mr. Delage testified he told Mr. Bradley that if he did not like the contents of the memo from Mr. Wallace, he should “put in a grievance and we’d go from there”. Mr. Bradley did not refute this in reply. Mr. Bradley did not at this time nor at any subsequent time file a grievance.

7. The next day, a scheduled work day for both Mr. Bradley and Mr. Shaver, they were asked to report to the Personnel office after their shift to meet with Mr. Ian Bush. When Mr. Bradley met with Mr. Bush he was told that the previous day’s incident warranted his dismissal. Mr. Bradley managed to talk Mr. Bush into not taking this action for two days so that Mr. Bush could investigate the matter further.

8. During the next two days Mr. Bradley contacted “everyone he could think of who he worked with”. He did not mention that he phoned Mr. Delage and Mr. Delage in his evidence did not claim he received a call from Mr. Bradley. Mr. Bradley could not recall with certainty contacting anyone in an official position in the union during the 2 days. Mr. Bradley explained that he did not contact his steward, Murray McCormick, because he was away on vacation. He did not contact any of the other 11 to 14 stewards in the plant either. It therefore appears that at least until his discharge Mr. Bradley was not looking to officials of the respondent for assistance in the matter.

9. After the two days had elapsed, Mr. Bradley reported back to Mr. Bush and was told he was discharged. Mr. Bush, according to Mr. Bradley, was not totally explicit as to the reasons why.

10. Mr. Bradley at this point seems to have decided to call upon the union for assistance. He said he “found out” Mr. Roger Poirier was President of the Local and he called him (Mr. Poirier did not testify therefore the only reliable evidence of what Mr. Poirier said or did was given by Mr. Bradley). Mr. Poirier said he did not know what he could do for Mr. Bradley. He said that if he himself were hiring for Domtar he would not hire himself. Mr. Poirier also said that “because of the 90 days he should forget it”. Mr. Bradley testified that in this conversation Mr. Poirier did not advise him to file a grievance. Mr. Bradley testified initially that he thought he had no “right” to do so “because of the 90 day bit”. Later in his testimony he claimed that he told Mr.



Poirier that the 90 days should not matter because he had been employed by Domtar previously.

11 Mr. Bradley testified that he did not contact anyone else in the union other than Mr. Poirier immediately after his discharge. During the month of September he said he spoke with Mr. Poirier on 4 or 5 occasions. Mr. Bradley said that these calls were to “bug” Mr. Poirier “to get information” as to why he was terminated. Sometime shortly after October 15, 1981, Mr. Bradley received a copy of an inter-office memo dated October 15, 1981 to Roger Poirier from Thomas Aitken, Personnel Superintendent for Domtar (Exhibit 4) which outlined his work history and performance (Satisfactory) prior to being hired in June of 1981 and what Domtar found wrong with his performance after June 23, 1981. What prompted Mr. Aitken’s memo to Mr. Poirier is unclear. In his testimony Mr. Bradley speculated that this memo must have been prompted somehow by Mr. Poirier as a result of his calls. However, Exhibit 4 could have resulted from Mr. Bradley’s direct correspondence with Mr. W. Emory, Resident Manager of Domtar for Cornwall; at the same time as he was calling Mr. Poirier Mr. Bradley wrote to Mr. Emory seeking a meeting with him to discuss his termination. After setting out what Mr. Bradley felt was unjust about his termination, he concluded the letter with the following paragraph:

I hope you will agree to review this matter with me, Mr. Bush, Mr. Wallace and my workmates on 1 and 5. If my re-instatement is not possible I hope you will at least see fit to clarify for me what my alleged [sic] personal problem is supposed to be. My job at Domtar, and my work record are things that I place high value on. I strongly feel that they were both unjustly taken away from me!

It is fair to conclude that while the general tenor is to achieve reinstatement, there is an alternate request for clarification as to the reasons for his termination. Mr. Bradley did not mention that he attended any meeting with company officials as a result of Exhibit 3 nor did he receive any direct written response to it.

12. Exhibit 4 also could have resulted from the intervention of Mr. Wilfred Oliver, National Representative of the Canadian Paperworkers Union. By October Mr. Bradley had expanded his horizons regarding who he should contact in the respondent to assist him with his termination. Sometime in October (it is unclear whether it was prior to or after he received Exhibit 4) Mr. Bradley personally went to the Montreal headquarters of the respondent. He claims he did not “get by the receptionist”. He did obtain from the receptionist additional names (besides Mr. Poirier) who he could contact: Mr. Oliver and a Mr. Holden in Toronto. Mr. Bradley said he never went to see Mr. Holden and he did not say he called him either. He did telephone Mr. Oliver and told him his problem. Mr. Oliver told Mr. Bradley he would have Mr. Poirier look into the matter. According to Mr. Bradley “nothing came of it”. According to Mr. Oliver he contacted Mr. Poirier and asked for a report. The result, according to Mr. Oliver, was Exhibit 4.

13. It is unclear from Mr. Bradley’s evidence whether he did anything by way of contacting the respondent between October and January 1982. He could not remember

for certain calling either Mr. Poirier, Mr. Oliver or anyone else in the union prior to January 1982 to dispute the contents of Exhibit 4 which Mr. Bradley in his testimony described as "full of lies". It is clear that he started calling Mr. Delage in January because he knew Mr. Delage had become President. Mr. Delage advised Mr. Bradley to write him a letter. Mr. Bradley did so on February 19, 1982 (Exhibit 5). Mr. Bradley's letter reveals that he was taking issue with some of the allegations in Exhibit 4. Mr. Bradley got no written reply to his letter but he said that Mr. Delage subsequently advised him he was "moving on it". Mr. Delage testified that he told Mr. Bradley that he would do everything he could. He says he also asked him why he had not put in a grievance as he had asked him to do five months prior. Mr. Bradley's response, according to Mr. Delage, was: "When you don't know what to do, it's pretty hard to do it". Mr. Bradley did not testify to the contrary in reply. Mr. Delage claimed he went to Mr. Aitken on several occasions after receipt of Exhibit 5 because he had a rapport with him and he had been able, in other situations, more or less to "iron things out" with him. He says he told Mr. Bradley that they "pretty well had things arranged to have Mr. Aitken rehire, but he had to give him time". This evidence more or less coincides with Mr. Bradley's. Mr. Bradley testified that Mr. Delage said he believed Mr. Aitken was "coming around slowly but surely". At no time did Mr. Delage advise Mr. Bradley to submit a grievance. Mr. Delage admitted that he is a hard person to reach and he did not contact Mr. Bradley very much. It seems clear there were several conversations between them.

14. Mr. Bradley claimed he had extracted a promise from Mr. Delage that he would phone him regarding the results of his discussions with Mr. Aitken in 4 or 5 weeks. Mr. Delage apparently did not fulfill his promise so Mr. Bradley wrote to James M. Buchanan, National President of the Canadian Paperworkers Union, sometime in June (Exhibit 6) seeking "some proper and immediate aid" from the respondent. By letter dated June 29, 1982 (Exhibit 7) Mr. Buchanan replied to Mr. Bradley that he was requesting Mr. Oliver to investigate and report to him. Sometime after July 6, 1982 he received a copy of a letter dated July 6, 1982 (Exhibit 8) from Mr. Oliver to Mr. Delage wherein Mr. Oliver identified the allegation of Mr. Bradley that Mr. Delage had received no answer to a call to his home. He also specifically requested Mr. Delage to let Mr. Buchanan and Mr. Oliver know "what has happened at Domtar and why Domtar will not take him back". Mr. Bradley claims he telephoned Mr. Buchanan as a follow-up to Exhibit 8 and Mr. Buchanan assured him he would be back to him immediately. When Mr. Bradley had not received the call from Mr. Buchanan more than a month later, he called again and said he was tired of waiting and was going to "take steps".

15. The step Mr. Bradley took was contacting a lawyer, Mr. Michael Bendel, and as a result of this, Mr. Bendel wrote, on behalf of Mr. Bradley, a letter dated September 28, 1982 (Exhibit 9) addressed to Mr. Delage.

Dear Sir:

*Re: Phillip Wayne Bradley*

I am the solicitor for the above named employee, who was fired by Domtar Fine Papers in September 1981.

He informs me that he has been unable to ascertain from you what steps, if any, have been taken by your local on his behalf. He showed me a copy of a letter from Mr. Buchanan, the President of the Union, dated June 29th, 1982, requesting the CPU Representatives to investigate the matter with you, but this letter has not led to Mr. Bradley learning of the action, if any, that has been taken on his behalf.

Unless I am in receipt of a satisfactory report of your attempts to have Mr. Bradley re-instated within two weeks of the date of this letter, I shall reluctantly have to advise Mr. Bradley that his bargaining agent does not appear to have provided him with adequate representation and that he should act accordingly.

Yours truly,

Michael Bendel

No response was received and this complaint was filed October 19, 1982. Neither Mr. Delage nor Mr. Oliver knew why there was no response to Mr. Bendel's letter.

16. Mr. Oliver testified about how the Canadian Paperworkers Union and its Locals handle internal administrative matters. Each local union has autonomy so that if a member objects to what the local executive has done, the member is advised to go to the "membership". If the membership does not satisfy the member complaining, then the member has a right to appeal to the National President. The National President would then send "someone" in. That "someone" would make a decision on the matter. If the member is not satisfied, then he/she can appeal the matter to the National Executive Board and if not satisfied with that Board's decision, can appeal to the National Convention which is held every 2 years. There is no evidence that Mr. Bradley was advised about the fact that he could "go to the membership" if he was dissatisfied with Mr. Poirier's or Mr. Delage's actions. While evidence was given that there were monthly membership meetings during the relevant times, there is no evidence Mr. Bradley was or should have been aware of this fact. There was no evidence that Mr. Bradley knew or was advised regarding the other steps he could take.

17. Mr. Delage testified that he brought up Mr. Bradley's situation at the Executive meeting in February of 1982, at which time he said they reviewed the collective agreement and interpreted the time limits in section 9, Step 1 as leaving the respondent no choice but to drop "it". Mr. Delage claims he was not familiar with the waiving of time limits. Mr. Delage did not make any satisfactory response to whether Step 3 was considered. The text of section 9 pertaining to the grievance procedure follows:

#### SECTION 9 - GRIEVANCE PROCEDURE

STEP 1 - Any employee who feels he has a legitimate complaint or grievance will take the matter up with his Foreman as soon as



possible, [sic] or no later than thirty (30) days, after the occurrence of the facts giving rise to the grievance. The employee, if he so wishes, will be accompanied by his Shop Steward or other Local Union Representative. Failing settlement of the grievance within a twenty-four hour period, the grievance will be reduced to writing and referred to Step 2.

STEP 2 – The written grievance shall be presented to the Superintendent of the Department concerned, who shall either settle the grievance within two (2) days or convene a panel, as set forth below, within a period of four (4) days. A grievance panel shall consist of (up to four) members of the Union, one of which must be an Officer of the Union and (up to four) members of the Company, one of which should be the Superintendent of the department concerned.

Following a meeting of such panel, a decision in writing shall be handed down by the Superintendent within a further period of one (1) calendar week.

STEP 3 – In the event the grievance is not settled in Step 2 above, the Local Union shall offer the matter to the National Union, who will, along with their Local Union, endeavour to affect [sic] a settlement with the Resident Manager of the Mill.

Following the above meeting, an answer will be handed down by the Resident Manager within three (3) days. In cases of discharge or suspension, or other Union grievances, the grievance shall commence at the second stage of the Grievance Procedure.

Grievance committee members shall be paid their straight time rate for time lost from their regular shift in connection with grievance hearings. This shall not include time lost as a result of Arbitration or any Third Party proceedings arising from complaints or grievances.

18. Mr. Oliver testified that if Mr. Bradley “had have entered a grievance (the respondent) would have taken the matter up”. Mr. Oliver claims that Step 1 leaves it up to the individual to take this step. He indicated that it was up to the local executive and membership to deal with any would-be or actual grievance and he could not overrule the local people’s decision. It is clear Mr. Bradley was never advised by any official of the respondent that he could enter his own grievance.

19. Other provisions of the collective agreement relevant to this decision are Mill Rules. These indicate that no distinction is made between probationary and non-probationary employees regarding the application of discipline up to and including discharge. They also reveal that the penalty of dismissal is an “extreme” one.



20. The argument of the complainant is that the officers of the Local, specifically Mr. Poirier, knew of the time limits for filing a grievance under the collective agreement and should have advised Mr. Bradley it was up to him to do so within the 30-day limit. The failure to advise him to do so, if caused by an interpretation of section 4(b), was a misconstruction of the collective agreement. This misconstruction was in two ways:

- (1) miscalculating the amount of work time necessary to become a regular employee as 90 *continuous* days; and
- (2) even if the calculation of time worked was correct, interpreting the limitation on the respondent's representation rights to eliminate Mr. Bradley's opportunity to file a grievance of his own.

Alternatively, if there was no misconstruction and section 4(b) means what the respondent interpreted it to mean, then the section should be struck down by this Board as being a violation of the section 68 duty, citing in support of this a similar case decided by the Canada Labour Relations Board in *Elliston & the U.S.W.*, (1982) 2 Can. LRBR Rep. 241. The complainant also argues that once the 30-day period had elapsed, Mr. Delage should have responded to Mr. Bradley's expressed wish to pursue his problem by attempting to get Domtar to waive the time limits. The complainant claimed the evidence showed that Mr. Delage only had a few conversations with Mr. Aitken and did not attempt to have the time limits waived for filing a grievance. This conduct falls far short of the onus to provide advice to members and to point out to the member avenues of recourse available. Failure to do this shows an unresponsive attitude. In support of this the complainant's counsel cited Raymond E. Brown, "The Duty of Fair Representation" (1982) 60, *Canadian Bar Review* 412 at pages 442-443. Finally, notwithstanding the respondent made no challenge to the complaint's timeliness, it was submitted that the complaint was submitted with "reasonable dispatch" and at no time did Mr. Bradley abandon his complaint. Mr. Bradley's situation was distinguishable from other cases where delay was a negative factor in the Board's determination (*Daley*, (1982) 2 Can. LRBR Rep. 392 and *Sheller-Globe*, [1982] OLRB Rep. Jan. 113).

21. A summary of the respondent's claim is that since Mr. Bradley was a probationary employee, he could not file a grievance and the union could not or would not represent him in a formal way even if he did. Mr. Bradley knew that he was probationary and what this status entailed. Even if this is incorrect, Mr. Bradley himself did not contact any stewards or officials of the Union.

22. The key question is whether section 68 was breached by Mr. Poirier acting on behalf of the respondent. In this connection the Board must interpret what Mr. Poirier may have meant when he advised Mr. Bradley "to forget it because of 90 days". In the absence of Mr. Poirier's testimony and considering Mr. Oliver's representations, I find that he meant the respondent would not represent Mr. Bradley in the grievance procedure because of section 4(b). The failure to advise Mr. Bradley that he could individually file a grievance indicates also that Mr. Poirier thought that without representation by the respondent he had no individual right to file a grievance. Mr. Oliver's statement that if Mr. Bradley had filed a grievance the respondent would have

“taken it up” does not change this conclusion because it is made *ex post facto* and contradicts his submissions as to the meaning the respondent attached to section 4(b) (see paragraph 3 above).

23. In the absence of any evidence from Mr. Poirier we cannot conclude that he did anything more than talk to Mr. Bradley four or five times in the same vein. He did nothing beyond the time when he received the October 15, 1981 memo from Mr. Aitken, probably because he continued to believe that Mr. Bradley should “forget it”. There is no evidence that, notwithstanding his belief there was no grievance possible in the circumstances, he attempted to “take the matter up” or “to discuss it” with management in an informal way, the course of action which Mr. Oliver claimed as the only one available to the respondent in view of section 4(b).

24. Section 68 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

25. In order to prove “arbitrariness”, it is not necessary to show that there was subjective ill will. The Board has in other cases found arbitrariness where the union has taken a totally unresponsive position (see the analysis of the meaning of “arbitrary” in section 68 in *C.U.P.E. Local 1000*, [1975] OLRB Rep. May 444, at page 462), or has totally ignored the merits of a complaint (see *I.A.W. Local 2-700*, [1972] OLRB Rep. Oct. 916). Mr. Poirier believed that section 4(b) released him and the respondent from any obligation to consider representing Mr. Bradley using the normal channels of the grievance procedure and eliminated Mr. Bradley’s right to file a grievance of his own. Assuming, without finding, that section 4(b) indeed meant that, I find that Mr. Poirier conducted himself in an arbitrary manner. One of the most fundamental ways in which a trade union represents bargaining unit members is through negotiation of a grievance procedure and through the participation of its officials in some or all of the steps in the grievance procedure. The respondent in this case negotiated a grievance procedure accessible to all bargaining unit members and did not negotiate a clause excluding probationary employees from the substantive right of having their discharge or suspensions subject to the standards set out in the Mill Rules. But in the same collective agreement the respondent stipulated, through section 4(b), that it would not represent probationary employees who have been discharged. This stipulation, in the context of this collective agreement, is an arbitrary one because it sanctions an unresponsiveness and the total ignoring of the merits of a probationary employee’s discharge simply because he/she is probationary. Without any explanation as to why probationary employees should not be represented by the respondent when they are discharged or why the merits of their discharge should not be considered, I must conclude that the respondent has arbitrarily abdicated its duty to represent Mr. Bradley because he was a probationary employee.

26. The fact that the memo of October 15, 1981 was sent to Mr. Poirier from Mr. Aitken does not in any way eliminate the effect of this breach of section 68 because there is no way to assess whether Domtar's position would have been the same in the context of the grievance procedure.

27. The fact that Mr. Delage made efforts on Mr. Bradley's behalf after February 19, 1982 also does not repair or correct the breach committed by Mr. Poirier because he did not attempt to represent Mr. Bradley through the grievance procedure. It is not necessary to find Mr. Delage's conduct a breach of section 68 in and of itself.

28. Therefore, the Board hereby finds that the respondent through its then President Mr. Roger Poirier, violated section 68. The Board hereby orders that:

1. the respondent union forthwith submit the matter of Mr. Bradley's discharge to arbitration for hearing on its merits;
2. Domtar forthwith take steps that are necessary for bringing Mr. Bradley's discharge to arbitration;
3. Domtar waive any preliminary objection as to timeliness it might have under the collective agreement that would preclude Mr. Bradley's discharge from being heard on the merits;
4. in the event Mr. Bradley's discharge is overturned and an arbitrator or board of arbitration makes an order of compensation, the union bears the burden of paying whatever compensation may be attributable to the delay caused by its violation of the *Labour Relations Act*, specifically any compensation owing from the date of termination up to and including the date of issuance of the arbitration decision.

29. The complainant's request for costs of bringing his complaint under section 68 is refused because this is not a case of sufficient overriding policy considerations to require a departure from the Board's normal practice of not awarding costs (*Radio Shack*, [1979] OLRB Rep. Dec. 1220).

30. The Board remains seized in the event that a dispute arises over the interpretation or implementation of its order.

31. The complaint is hereby allowed.

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**2390-82-R International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Applicant, v. Calorific Construction Company, Respondent**

**Membership Evidence – Confirmation documents not indicating payment of dues or initiation fees – Not acceptable as evidence of membership**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and F. W. Murray.

**DECISION OF THE BOARD; March 10, 1983**

1. In this application for certification the applicant filed seven confirmation documents. These documents are variously dated in February of 1982, are signed by persons who confirm that they have been members of the applicant for periods varying between eleven and eighteen years. These signatories are attested by a person who is indicated to be a business representative of the applicant. In addition, the confirmation documents contain certain personal information – the person's address, his telephone number, his union register number, his social insurance number and the name and address of his employer. There is no indication on any of the confirmation documents that the person who confirms his membership has paid to the applicant on his own behalf an amount of at least one dollar in respect of initiation fees or monthly dues of the applicant.

2. Sections 1(1)(1) and 7(1) of the Act provide:

1.-(1) In this Act,

• • •

(1) "member", when used with reference to a trade union, includes a person who,

(i) has applied for membership in the trade union, and

(ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union, and "membership" has a corresponding meaning.

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determine under clause 103(2)(j).

The confirmation documents do not indicate any payment of initiation fees or monthly dues to the applicant. The Board is not prepared to find that the confirmation documents are evidence that the persons who signed thereon are members of the



applicant within the meaning of section 1(1)(1) of the Act. Similarly, the Board is not prepared to find that the confirmation documents are evidence of membership as contemplated by section 1(1)(1). It follows that there were no employees in any bargaining unit that the Board might find to be appropriate for collective bargaining who are members of the applicant under section 7(1) at such time as is determined under section 103(2)(j) of the Act.

3. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in any bargaining unit the Board might find appropriate, at the time the application was made, were members of the applicant on March 1, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

4. This application is dismissed.

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**File No. 2261-82-U; File No. 2286-82-U; File No. 2287-82-U; File No. 2370-82-U** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Complainant, v. **Constellation Hotel Corporation Ltd.** Respondent

Constitutional Law – Discharge for Union Activity – Practice and Procedure – Unfair Labour Practice – Prior Board decision holding reverse onus provision of Act not contrary to *Charter of Rights and Freedoms* – Ontario Court of Appeal decision relating to *Narcotics Control Act* not affecting Board's reasoning – Employer directed to proceed first

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and Stewart Cooke.

**APPEARANCES:** S. Wahl and F. DaSilva for the complainant; Stewart D. Saxe, William Watson and Valerie Meil for the respondent.

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER STEWART COOKE; March 28, 1983**

1. These are consolidated complaints under section 89 of the *Labour Relations Act*, alleging that a number of employees of the respondent have been laid off or discharged for union activity.

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3. The respondent admits that the grievors named in the complaints had been its employees, and that all have had their employment terminated. The respondent takes the position, however, that it ought not to be directed, in accordance with the Board's

usual practice, to proceed to call its evidence first. It relies in adopting this position on section 11(d) of the *Canadian Charter of Rights*, which it says renders void section 89(5) of the *Labour Relations Act*. Section 11(d) of the *Charter* reads:

Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

and section 52(1) of the *Charter* provides:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 89(5) of the *Labour Relations Act* provides:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

4. Mr. Watson, on behalf of the respondent, argues that the requirement of the Board under section 89(5) for an employer to proceed with its evidence first violates the principle of "innocent until proven guilty" enshrined in section 11(d) of the *Charter*. He points out that the term "person", under either the Ontario or Federal *Interpretation Act*, is made to include a corporation, such as the present respondent, although he also notes that uncertainty presently exists amongst legal scholars as to whether either of those Acts can be said to apply to the *Charter*. Noting that section 11(d) speaks of a person "charged with an offence", Mr. Watson points out that the *Charter* makes no distinction between "criminal" or federal offences and provincial ones. Counsel points further to section 96(1) of the *Labour Relations Act* as containing a clear recognition that any violation of the Act constitutes an "offence" under the Act. He acknowledges that provision is made for the Board to issue its consent prior to any prosecution being undertaken in Provincial Court under the Act, but argues that this does not in any way detract from his submission that a finding of a violation of the Act by anyone empowered to do so (in this case, the Board itself) finds an "offence" under the Act. Finally, Mr. Watson argues that even if reference be had to the words "criminal and penal matters" in the marginal notes as an aid in interpretation (a course which Mr. Watson points out, under the *Interpretation Acts*, is not appropriate) the Board's remedies under section 89 can in some instances be described as "penal". The only instance which counsel cites in support of this is a wage-compensation order by the Board which requires an employer to, in effect, pay twice for the same work.

5. This is not the first attack upon section 89(5) which the Board has seen since the *Charter* was proclaimed in force. In *Third Dimension*, [1983] OLRB Rep. Feb. 261, the Board wrote:

28. It should be stressed that neither the Board nor the courts have ever viewed a complaint under section 89 of the Act as being penal or quasi-criminal. Section 96 makes specific provision for the prosecution of offenses under the Act. A prosecution arising out of an alleged offense under the Act can be taken only with the consent of the Board granted pursuant to an application under section 101(1) of the Act. Consent is granted only where a triable issue or *prima facie* case is established and where the Board is satisfied that the prosecution will "serve the interests of the bargaining relationship between the parties or generally advance the interests of collective bargaining in the Province". (*Fleck Manufacturing Company*, [1978] OLRB Rep. July 615.) Any prosecution for an offense under the Act must be initiated by information pursuant to the *Provincial Offences Act*, R.S.O. 1980, c.400, s.24 and heard by a provincial offences Court. Section 89 of the Act and the reverse onus provision have no application in those proceedings.

29. The remedial authority of the Board under section 89 is directed to very different purposes. Part of the thrust of the 1975 amendments to the *Labour Relations Act* was to provide greater scope for civil redress, as an alternative to criminal prosecutions, in the resolution of unfair labour practice complaints. The broad remedial authority given to the Board in section 89 represents a conscious policy choice to give the Board the jurisdiction to fashion the kinds of civil remedies that will best advance the purposes of the statute. Since the 1975 amendments a party seeking consent to prosecute has a substantial burden, given the Board's presumptive view that the remedies available under section 89 are, generally, more constructive than a criminal prosecution in the promotion of good industrial relations, (*A.A.S. Telecommunications Ltd.*, [1976] OLRB Rep. Dec. 751 at 761).

30. With that purpose in mind the Board has consciously refrained from allowing its remedial orders to become in any way punitive. (*Radio Shack*, [1979] OLRB Rep. Dec. 1220.) As the decision in *Radio Shack*, as confirmed by the Court, (Sub. nom. *Re Tandy Electronics Ltd. and United Steelworkers of America*, (1980) 30 O.R. (2d) 29 (Div. Ct.)) made clear, any relief ordered by the Board on a finding of an unfair labour practice under section 89 of the Act must be compensatory and not punitive. As the Court observed at p. 47 (O.R.):

So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board.

Section 89 of the Act has, therefore, been consistently viewed by the Board, with the approval of the courts, as remedial and not



punitive legislation. The purely civil and remedial nature of the Board's jurisdiction under section 89 raises good reason to doubt whether the presumption of innocence which applies to the prosecution of offences under the *Charter of Rights* can have any bearing on unfair labour practice complaints under that section.

6. The Board having turned its mind to this issue and rendered a decision, it would not be inclined to entertain the issue a second time, unless it is shown that some pertinent argument can be made that was not available to the Board in the earlier case. In this regard the respondent relies on the Reasons for Judgment of the Ontario Court of Appeal in *Her Majesty the Queen v. Oakes*, which were released February 2, 1983, (leave to appeal to Supreme Court of Canada granted March 21, 1983) and which were not made available to the Board in *Third Dimension*, *supra*. But the *Oakes* case dealt with the connection between "proved" and "presumed" facts in a reverse-onus provision in criminal proceedings under the *Narcotics Control Act*; it did not consider the issue of what constitutes an "offence" under the *Charter*. The *Oakes* case does not, therefore, affect the above-cited reasons of the Board in *Third Dimension*. Section 96(1) of the *Labour Relations Act* provides:

96.-(1) Every person, trade union, council of trade unions or employers' organization that contravenes any provision of this Act or of any decision, determination, interim order, order, direction, declaration or ruling made under this Act is guilty of an offence and on conviction is liable.

(a) if an individual, to a fine or not more than \$1,000 or

(b) if a corporation, trade union, council of trade unions or employers' organization, to a fine of not more than \$10,000.

The word "offence" is not suggested to have any independent significance outside of the context of section 96 (and the related sections which follow it), and that section provides that "every person . . . that contravenes any provision of this Act . . . is guilty of an offence and *on conviction* is liable. . ." The section then goes on to provide for the levels of penal consequences, by way of fines, which may flow from such conviction. This, indeed, appears to be the sole purpose of section 96(1), in considering the matter of what are termed "offences" under the Act; i.e., to provide for the penal consequences which are to flow in the event of a conviction. And it is acknowledged by the respondent that only the Provincial Court can make such a conviction. No "conviction" of an offence, as the words appear in section 96, can be made in proceedings before the Board. Indeed, the prosecution in Provincial Court of an "offence" under section 96(1) requires, even after the consent of the Board in section 101, a complete trial *de novo*, as noted in *Third Dimension*, *supra*. The principle of "innocent until proven guilty" is well known to the penal law of this and related jurisdictions, as noted, e.g., in *Her Majesty the Queen v. Oakes*, *supra*, and did not begin with passage of the *Charter of Rights*. It is worth noting, in conclusion therefore, that the Legislature of the Province, in enacting section 89(5) of the *Labour Relations Act*, chose not to extend the reverse onus to the prosecution of offences in Provincial Court, notwithstanding that precisely



the same allegations may be in dispute with the same practical arguments in favour of having the employer proceed first. As to whether a corporation is a "person" for the purposes of the *Charter*, now see *PPG Industries Canada Ltd. v. AG of Canada* (B.C. C.A.), released February 4, 1983, as yet unreported, (leave to appeal to Supreme Court of Canada granted March 21, 1983).

7. The respondent will be directed to proceed first with its evidence when hearings resume, in accordance with the Board's normal practice as described, for example, in *ICB Warehousing*, [1976] OLRB Rep. Oct. 621.

#### **DECISION OF BOARD MEMBER F. W. MURRAY;**

1. While I accept the responsibility to uphold the Ontario *Labour Relations Act* and the Ontario Labour Relations Board's responsibility to administer this Act, I cannot help but feel that the Courts are the proper forum for decisions concerning the application of such legislation as the *Charter of Rights* and of issues where the *Charter* and some other Act appear to be in direct conflict. This is particularly so when the Board has already dealt with the issue. (See, *Third Dimension* [1983] OLRB Rep. Feb. 261)

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#### **0207-82-R Brian Schade, Applicant, v. Ontario Sheet Metal Workers' Conference, Respondent, v. Culliton Brothers Limited, Intervener**

**Construction Industry - Employee - Termination - Collective agreement requiring union membership for all employees in unit - Employees swept into provincial agreement by operation of "deemed recognition" clause filing termination application prior to joining union - Whether having standing - Status of employees swept in by s.137(2) reviewed**

**BEFORE** R. O. MacDowell, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

**APPEARANCES:** *R. C. Sills, Q.C., and Brian Schade for the applicant; B. Fishbein, R. Belleville and R. Brown for the respondent; G. Grossman for the intervener.*

#### **DECISION OF VICE-CHAIRMAN R. O. MACDOWELL AND BOARD MEMBER J. WILSON; March 17, 1983**

1. This is an application under section 57 of the *Labour Relations Act* which was adjourned pending a final decision in a related proceeding involving the same parties. (See Board File No. 2245-81-M, interim decision released March 17, 1982, reported at [1982] OLRB Rep. March 357; final decision released November 10, 1982, reported at [1982] OLRB Rep. Nov. 1602.) The circumstances giving rise to this application were reviewed in these earlier Board decisions. The details need not be repeated here. It will suffice to briefly sketch in the context in which the present

proceeding arises. Reference will be made to the following provisions of the *Labour Relations Act*:

57.-(2) Any of the *employees in the bargaining unit defined in a collective agreement may*, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the *employees in the bargaining unit*,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

• • •

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the *number of employees in the bargaining unit* at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

137.-(2) Where an employer is represented by a designated or accredited employer bargaining agency, the *employer shall be deemed to have recognized all of the affiliated bargaining agents* represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions *in respect of the employees of the employer* employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

145.-(4) After the 30th day of April, 1978, where an affiliated bargaining agent obtains bargaining rights through certification or voluntary recognition in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), the employer, the affiliated bargaining agent, and *the employees for whom the affiliated bargaining agent has obtained bargaining rights* are bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent and an employer bargaining agency representing a provincial unit of employers in which the employer would have been included.

147.-(2) *A provincial agreement is*, subject to and for the purposes of this Act, *binding upon* the employer bargaining agency, the employers represented by the employer bargaining agency, the employee bargaining agency, the affiliated bargaining agents represented by the employee bargaining agency, *the employees represented by the affiliated bargaining agents* and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), and upon such employers, affiliated bargaining agents and employees as may be subsequently bound by the said agreement.

(emphasis added)

For ease of exposition, the parties herein will be referred to as “the applicant”, “the union”, and “Culliton” or “the Company”. In referring to the respondent simply as “the union”, the Board recognizes that, in reality, it is a designated employee bargaining agency which includes a number of local unions.

2. Culliton is a construction contractor which employs sheet metal workers. Its primary place of business is in the City of Stratford. Its normal sphere of operations is in Western Ontario. The applicant is one of five sheet metal workers who work out of the Company’s Stratford location. These five employees have been employed by the Company for some years. The applicant, Brian Schade, for example, has been employed by the Company since 1974.

3. In the summer of 1976, Culliton was employing sheet metal workers on a construction project in the City of Cornwall – that is, outside its usual sphere of operations. Local 47 of the Sheet Metal Workers’ International Association organized these employees, and on August 24, 1976, the Board certified Local 47 as the bargaining agent for all sheet metal workers employed by Culliton in Board Area No. 31 (the United Counties of Stormont, Dundas and Glengarry). As a result of that certificate, and an outstanding accreditation order, Culliton was automatically “plugged in” to an existing collective agreement between Local 47 and the Mechanical Contractors’ Association of Ontario. That collective agreement was applicable in the industrial, commercial, institutional (ICI) and residential sectors of the construction industry, and thereafter covered Culliton’s construction activities in those sectors in Board Area No. 31.

4. In 1978, the Legislature substantially amended the construction industry provisions of the *Labour Relations Act*. The 1978 amendments introduced province-wide bargaining by trade in the “ICI sector” of the construction industry through designated employer and employee bargaining agencies (essentially designated employer associations and province-wide councils of local unions). Thereafter, the relevant agreement binding Culliton’s ICI operations in Board Area No. 31 was the province-wide ICI sheet metal agreement negotiated pursuant to the new statutory bargaining scheme.

5. Prior to May 1, 1980, the so-called provincial agreement was “provincial” in name only, since Culliton was bound to apply it only to the extent, and in areas, where



a local union of the sheet metal workers had bargaining rights – that is, only in Board Area No. 31. The 1978 amendments changed the locus of bargaining, but did not affect union recognition or alter established bargaining rights which were still rooted in local Board areas. Because the Company was not normally active in Eastern Ontario, the union's bargaining rights in that area, and the provincial agreement, were largely irrelevant. But then, the Legislature passed section 137(2) of the Act. The effect of section 137(2) was to extend the union's bargaining rights beyond Board Area No. 31 and require Culliton to recognize the union and apply the collective agreement throughout Ontario.

6. Section 137(2) was part of a package of amendments designed to further consolidate and rationalize the bargaining structure in the construction industry, which, in some instances, despite the changes in 1978, was still fragmented and uneven in its application. As a result of the passage of section 137(2), wherever a local union had established a foothold in any geographic area in Ontario, an employer would be deemed to have recognized its sister locals throughout Ontario, which, as a group with the parent union, typically composed the provincial council of unions designated as the employees' bargaining agency. Thus, in the instant case, because Local 47 had established bargaining rights for sheet metal workers in Board Area No. 31, each of the other geographically-based local unions acquired bargaining rights in their areas by deemed recognition. In the result, the union had bargaining rights for all sheet metal workers employed by Culliton wherever they worked in Ontario.

7. Usually the contractor's "core employees" in his home base would already be unionized. The effect of section 137(2) was merely to extend bargaining rights to the hinterland where, previously, he had operated as a "non-union" contractor. Here, of course, the applicant and his fellow employees had never been, or wished to be, union members. From their point of view, the extension of the "academic" rights established by Local 47 in the Cornwall area meant that they were involuntarily swept into a collective bargaining relationship, and became represented by a trade union, which they had never previously joined or supported.

8. Section 137(2) does not address the situation of employees who are swept into the sphere of collective bargaining by its deemed recognition provisions. The extension of bargaining rights was not made contingent upon a showing of employee support. Moreover, since the collective agreement which became binding upon the Culliton employees by operation of section 137(2) made membership in the union a condition of employment, the swept-in employees (initially, at least) would automatically be in breach of a material condition of employment. It remained to be determined whether the trade union could bring about their termination through enforcing the terms of the collective agreement, and further, whether the union was under any obligation to offer these employees membership or accept them into membership if they sought to join. These issues were canvassed in the two decisions of the Board in Board File No. 2245-81-M.

9. Board File No. 2245-81-M was an application by the union under section 124 of the Act to establish that Culliton was bound by the province-wide agreement and to require the Company to apply its terms – including the union security provisions – to the Company's activities in the Stratford area. It was launched in January 1982, almost



18 months after the statutory extension of bargaining rights upon which the union's application was based. The issues and arguments raised and resolved in that case are fully set out in the Board decisions, and need not be repeated here. The initial Board decision in March, 1982, established that the union did indeed have bargaining rights. The Board found that those bargaining rights had not been abandoned since 1976 and were extended by section 137(2) to Culliton's activities in Western Ontario. The second Board decision dealt with the application of the collective agreement, and the obligation of Culliton's employees to become union members.

10. The employees attended all of the hearings in Board File No. 2245-81-M. Initially they were without counsel. Subsequently, they retained their present solicitor who appeared for them at the second hearing and filed this termination application on their behalf. From their point of view, it was obvious that their rights, status, and wishes, were not the union's prime concern. In its pleadings, the union sought remedies which could mean their termination and replacement by union members. The employees did not understand the statutory framework and, not surprisingly, were unenthusiastic about union representation, and apprehensive about the consequences of the statutory extension of bargaining rights. Mr. Schade testified that he resented the fact that trade union representation was being thrust upon him, and that his first direct contact with the union was in the section 124 application where it sought to have him discharged.

11. After the first Board decision (in March) made it clear that the Company was bound by the collective agreement, the employees filed this termination application. They did not seek to become members of the union until after the second Board decision in November of 1982. That decision determined that the terms of the collective agreement did require them to join the union but that, in all the circumstances, they should be given a reasonable opportunity to do so. Given the uncertainties respecting their status and obligations, the Board was not prepared to direct their termination even though, to that point, neither the employees nor Culliton had been complying with the terms of the agreement. It was (and is) unnecessary to consider their position had they failed to seek, or been denied, membership (although it appears to be implicit in the Board's decision that the union would ordinarily be expected to offer membership as it eventually did here).

12. There is no dispute that, at all material times, the five employees who bring this termination application have been the only sheet metal workers employed by Culliton, or that they have been performing sheet metal work in the ICI sector. They were clearly doing "bargaining unit work" to which the province-wide sheet metal collective agreement applies. That is why the union asserted in its section 124 application that there had been a violation of that agreement. The applicant and his colleagues were sheet metal workers doing bargaining unit work in the ICI sector, but they were not members of the union as the agreement required. The Board accepted that proposition and directed that they seek membership in the union or face termination. In the instant case, however, the union asserts that because the employees were not union members at the time this termination application was made (i.e., April 26, 1982), they were not "employees in the bargaining unit defined in [the] collective agreement", and, therefore, not individuals having status to bring an application under section 57(2). This issue was raised in the section 124 proceeding, but was expressly

left to be determined by this panel of the Board. In support of the union's contention, we were referred to the following cases: *The Sudbury Star*, [1978] OLRB Rep. Sept. 873; *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577; *Master Insulation Company Limited*, [1980] OLRB Rep. Feb. 242 and [1980] OLRB Rep. May 744; *Cooper Construction Company Limited*, [1982] OLRB Rep. Aug. 1152; *Beef Terminal (1979) Limited*, [1981] OLRB Rep. March 244 and April 422; and *Thomas Construction (Galt) Ltd.*, [1982] OLRB Rep. Nov. 1727. The union argues, in the alternative, that on the basis of the evidence before it, the Board cannot be satisfied that the statements in opposition to the union tendered by the applicant reflect the voluntary wishes of those who signed them.

13. The union's preliminary submission is based upon the opening words of section 57(2) and the terms of the province-wide sheet metal workers' agreement. The latter contains the following provisions:

## **ARTICLE 2 – DEFINITIONS**

In this Agreement:

• • •

**2.6** “employee” means a certified journeyman sheet metal worker or registered apprentice, as well as sheeter/decker, welder, sheeter's assistant and material handler engaged in the sheeting and decking segment of the sheet metal industry; recognized by the local union and employed in the shop or on the job site except as otherwise specifically provided in this Collective Agreement.

• • •

**2.8** “member” means a certified journeyman sheet metal worker; sheeter/decker, welder, sheeter's assistant and material handler in the sheeting and decking segment of the sheet metal industry, recognized by the local union and employed or eligible to be employed by an employer in the shop or on the job site.

## **Article 8 – Union Security**

**8.1** The employer agrees it shall be a condition of employment for all employees covered by the terms of this Agreement, to be a member of, and to maintain membership in good standing, in one of the local unions.

## **Article 21 – Hiring Procedure**

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**21.2** Whenever after reasonable notice, (48 hours) excluding Saturdays, Sundays and Holidays, the local union is unable to

furnish a sufficient number of such duly qualified members and registered apprentices recognized by the Union, to meet the requirements of the employer, then the employer may secure such additional sheet metal workers from other sources as may be necessary, it being understood that they shall be eligible and shall comply with the requirements of the Union and thus become covered by the terms of this Agreement.

14. In the union's submission, section 57(2) makes membership in the "*bargaining unit defined in a collective agreement*" a prerequisite for a termination application. Here, it argues, the bargaining unit is defined in terms of union membership which is made compulsory by Article 8.1. Since the applicants are not members of the union they cannot be considered to be employees in the bargaining unit. In other words, the union asserts that the bargaining unit is defined in terms of union membership rather than employment status and craft skills, so that neither a non-member, nor an individual who ceases to be a member in good standing can be considered to be an employee in the bargaining unit. We have difficulty accepting this submission, given the way in which the union acquired the right to represent Culliton's employees. And we note that this collective agreement does not contain a recognition clause (which it should have) expressly defining the bargaining unit which the union represents.

15. Section 137(1)(e) of the Act provides that a provincial agreement is a document which prescribes the obligations of an employer "for those employees the affiliated bargaining agents hold bargaining rights". It also prescribes the rights of "the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector" of the construction industry. There can be only one such provincial agreement "affecting employees represented by affiliated bargaining agents" (see section 146). By virtue of section 147, the provincial agreement is binding, *inter alia*, on "the employees represented by the affiliated bargaining agents". By virtue of section 137(2), an employer is "deemed" to have recognized the geographically defined local affiliated bargaining agents as the representatives of its employees working in the ICI sector in their respective geographic jurisdictions (see also section 145(4)). Once a union has acquired bargaining rights by means of this "deemed" voluntary recognition, the statutory scheme suggests that the provincial agreement applies to all of its activities and employees. (See section 145.)

16. The only reason why Culliton could be bound by the provincial collective agreement is that it was "deemed" to recognize the union's position throughout Ontario and the union was "deemed" to have bargaining rights for and represent Culliton's employees. But the statutory scheme appears to contemplate that where a union has bargaining rights for or represents employees, the provincial agreement necessarily applies. In this context, it seems anomalous to suggest that the union has bargaining rights for, represents, employees outside Board Area No. 31, but that those employees are not part of the bargaining unit to which the provincial collective agreement applies. We do not think that the Legislature contemplated the creation of a body of employees represented by the union but outside the scope of the provincial collective agreement, nor would such employee group fit easily into the integrated scheme. Why would the Legislature seek to create a group of employees, previously unorganized, who are now deemed to be represented by the union but are not covered by the collective agreement



which applies automatically to any other employees for whom the union has bargaining rights? It does not make sense; and to the extent that this denies the "swept-in" employees the benefits of collective bargaining, and subjects them to the prospect of termination and replacement by others it is arguably unfair.

17. Another example may clarify the difficulties with the union's position. Suppose on a simple application for certification the Sheet Metal Workers' Union has the support of 75% of the employees in its craft bargaining unit. It would then be certified and, by operation of law, the employer becomes bound by the provincial agreement. But section 144(1) defines the bargaining unit for certification purposes as including "all employees who would be bound by a provincial agreement". Is the non-member minority excluded from the unit and collective bargaining because they are not members of the union and outside the scope of the provincial agreement which is defined in terms of union membership? In this common scenario, must one hold that the minority, who were clearly in the unit for certification purposes, are not covered by the provincial agreement because its bargaining unit is defined in terms of union membership? It would take the clearest possible contractual language to compel this conclusion as to the parties' intentions. One must also remember that at the time section 137(2) extended the union's bargaining rights they were based upon and flowed from the collective agreement rather than the certificate issued some years before. Again, it would be curious to suggest that these bargaining rights were not extended, because the collective agreement could not be extended to other employees.

18. The present situation provides a case in point. Here the union had no members at all. Culliton had no employees working in Board Area No. 31 and had not been active in that area for several years. None of the employees "swept in" by section 137(2) had ever indicated any desire for trade union representation. Should we conclude that on May 1, 1980 the union not only acquired the right to represent them, but also that they should be denied the fruits of that representation until such time as they sought and were accepted into membership? On this view, for practical purposes, the province-wide bargaining scheme has not been extended at all. It simply opens the possibility of replacing longstanding employees with members of the union. We do not think that that was the legislative intention and, in this respect, we agree with the result set out in the second decision of the Board in the previous proceeding. (See paragraph 37, where the Board found that the employees were "employees in the bargaining unit of the provincial agreement and were bound by it")

19. In our view, when the non-union employees of Culliton were swept into the province-wide bargaining scheme, it was intended that they be regarded as employees in the bargaining unit defined in the agreement and possessing all of the rights, privileges, and obligations of any other employee under the Act represented by the union. If they did not join the union they could be terminated, because that is what the agreement required. But as employees in the bargaining unit they could also seek a termination of the union's bargaining rights in accordance with the provisions of section 57. And, as we have already noted, it would take the clearest possible language to drive us to the conclusion that the parties to the provincial agreement intended that craftsmen for whom the union has acquired bargaining rights and who are eligible for union membership should not be treated as part of the bargaining unit covered by the



collective agreement – although, again, as employees bound by the agreement they may have to join. We do not think the contractual language here goes this far.

20. The union places primary reliance upon the decision of the Board in *April Waterproofing* (cited *supra*). There, the Board had before it a “displacement” certification application, where the support for the raiding union came from two employees who had been recently hired “off the street” contrary to the terms of the incumbent union’s collective agreement. That collective agreement required that all new employees should be members of the incumbent union hired through the incumbent union’s hiring hall. In *April Waterproofing*, however, the company had breached this contractual obligation, and, in so doing, had acquired two employees who were adherents of a rival union. The hiring of these two employees was improper from its very inception, yet they purportedly provided the basis for the raiding union’s attack upon the incumbent union’s bargaining rights. In determining that these employees who had been hired contrary to the terms of the collective agreement were not lawfully in the bargaining unit, and should not be treated as employees in the unit for the purpose of section 7(1) of the Act, the Board made the following observations:

4. The basis of the intervener’s challenge to the three individuals in dispute is the admitted fact that a few days prior to the filing of the application, the respondent hired them directly without going through the intervener’s hiring hall contrary to the provisions of the collective agreement binding upon the respondent and the intervener. Under the terms of the collective agreement, the respondent is required to inform the union of its manpower requirements, and only if the intervener cannot supply sufficient of its members to do the work involved is the respondent free to hire manpower directly. The intervener’s contention is that the respondent, acting with the knowledge of the applicant, hired the individuals in dispute so as to enable the applicant to file an application for certification. This contention is disputed by both the applicant and the respondent. The respondent’s position is that the person who hired the disputed individuals was simply not fully aware of the hiring provisions in the collective agreement. At the hearing the parties indicated they were not in a position to lead evidence with respect to the respondent’s motivation in hiring the disputed individuals, but they would do so at a later date if the Board considered it a relevant factor in its determination.

5. The intervener contends that since the applicant has membership support only among employees hired contrary to the terms of the collective agreement the application should either be dismissed, or in the alternative, the ballots cast by the individuals in dispute in the pre-hearing representation vote not be counted. The applicant contends that although the individuals in dispute were hired contrary to the terms of the collective agreement, nevertheless, at the relevant time they were employees of the respondent and accordingly the Board should now direct the counting of all the ballots cast in the vote.

6. Employment patterns in the construction industry differ from those in most other industries. One major difference is that the manpower requirements of most construction firms fluctuate greatly over relatively short periods of time. Not only do different projects require different size work forces, but frequently the number of tradesmen required on any particular project will vary depending on the stage of development of the project. Employment levels also vary because of cyclical and seasonal fluctuations in construction activity. For their part, most construction tradesmen are required to work for a succession of different employers. These factors have resulted in the negotiation of collective agreement terms which are unique to the construction industry. This fact is recognized in the following excerpt from the judgment of the Ontario Court of Appeal in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, (1975), 8 O.R. (2d) 103 at p. 112:

In this industry, there is no continuing employment and so collective agreements have developed to ensure a source of labour to the contractor, to provide for preference in the employment of trade union members and, while establishing the terms and conditions of such employment, to provide other benefits which may become due or payable at a time when the union member is not employed.

7. The displacement of one union's bargaining rights by another is by no means rare in the construction industry. Such cases generally involve situations where the applicant union has won over the allegiance of members of the incumbent union who were hired by the employer in accordance with the provisions of the incumbent's collective agreement. The instant case, however, involves an entirely different situation. Here, the respondent did not hire the three individuals in dispute through the intervening union as required by the terms of the relevant collective agreement, but rather, it hired them "off the street". The applicant in turn seeks to displace the intervener's bargaining rights on the basis of the fact that two of the individuals so hired are its supporters.

8. There can be little doubt but that at the relevant time there existed a common-law employee-employer relationship between the respondent and the three individuals challenged by the intervener. That by itself, however, is not determinative of their status as bargaining unit employees. See *Local 273, International Longshoremen's Association v. Maritime Employer's Association*, [1979] 1 S.C.R. 120. In our view, the bargaining unit is comprised of employees employed under the terms of the applicable collective agreement. To be so employed, an employee must have been hired in accordance with the provisions of the agreement. The three individuals in dispute were not hired in accordance with the

provisions of the collective agreement and accordingly, in our view, they do not come within the bargaining unit covered by the collective agreement. This being so, we are satisfied that in ascertaining the number of employees in the bargaining unit for the purposes of section 7(1) of the Act, the three individuals in dispute should not be taken into account.

21. This approach was subsequently adopted in *Cooper Construction, supra*. It must be noted it does not require advertent misconduct on the part of the employer. Although in *April Waterproofing* it was alleged that the employer had intentionally hired the two employees to foster a raid, the Board did not hear evidence on, or determine, that issue. *April Waterproofing* stands for the proposition that employees illegally hired contrary to the terms of an existing collective agreement should not be considered employees in the bargaining unit even though their hiring was inadvertent and not intended to foster a representation application. The fact that the employer may not have intentionally breached its contractual obligations is no answer to the prejudice which his actions may cause.

22. The problem raised in *April Waterproofing* is understandably a difficult one given the transitory nature of employment in the construction industry, and the ease with which an employer's hiring practices can alter the composition of the bargaining unit, and undermine established bargaining rights. If an employer intentionally or unintentionally fails to abide by its legal obligation to hire union members, it is relatively easy to create a situation where non-members – albeit perhaps only temporarily – will be in a position to seek termination of the union's bargaining rights or representation by another union. Union members may be denied the opportunity for present and future employment because of the activities of individuals who should not have been hired at all. The potential for abuse, and the obvious unfairness of putting a union's rights at risk because of the views of individuals who should not even be there, underlies the Board's decision in *April Waterproofing*. Why should the rights of union members turn on the speed with which the union can compel enforcement of the collective agreement to eliminate non-members whom the employer has unlawfully employed? Should the union's rights turn on whether it can require compliance with the agreement through a proceeding under section 124 more quickly than the employees whom it seeks to eliminate can file a termination application under section 57?

23. The approach in *April Waterproofing* recognizes the need to accommodate individual and institutional rights in a way which is faithful to the statutory parameters within which the Board must operate, yet is also sensitive to the requirements of labour relations policy and orderly collective bargaining. No doubt similar considerations influenced the Courts in *Blouin Drywall* and *Maritime Employer's Association* which were referred to in *April Waterproofing*. In *Blouin Drywall*, the Ontario Court of Appeal held that a potential employee in a union hiring hall had certain inchoate employment rights under a collective agreement even though no common-law employment relationship existed. Similarly, in *Maritime Employers' Association*, the Supreme Court of Canada determined that a concerted refusal to refer workers from a hiring hall constituted a strike even though, again, the individuals in question were only potential employees. In both cases the Court acknowledged that common-law employment considerations did not appropriately capture the collective bargaining reality.



24. So did the Board in *April Waterproofing*. The Board recognized that under the Act contractual rights and statutory rights are intertwined so that in some circumstances the employer's abrogation of the former could irreparably prejudice the latter. Individuals improperly hired could repudiate the statutory rights of those who should have been hired. In the Board's view, this result was inconsistent with the intended meaning of the opening words of section 7, and the statute was interpreted in that light. Of course, the Board might equally have said that it would not schedule a representation vote until the composition of the bargaining unit was in accordance with the legal requirements of the collective agreement; however, the Board considered it more appropriate and direct to treat individuals improperly hired (i.e., in the bargaining unit contrary to its contractual requirements) as not being members of the bargaining unit for the purposes of a representation application.

25. There can be little doubt that if an employer, in contravention of its contractual obligations, hires particular employees in order to foster a representation application, he will be breaching section 64 of the Act which prohibits employer interference in the formation, selection, or administration of a trade union. Indeed, where an employer has retained in its employ individuals who have been illegally hired, there may well be an onus of explanation cast upon the employer to satisfy the Board that it did not continue the employment of the disputed individuals "artificially" for the purpose of influencing a potential representation application or representation vote. For example, in *Custom Aggregates*, [1978] OLRB Rep. March 215, the Board determined that a new vote should be held where an employer artificially kept certain strike replacements employed because they were likely to vote against a union in a termination application.

26. Section 89 offers one remedy for such abuses. There are others. Where the employer has fostered a raid by hiring adherents of a rival union, the Board will probably raise a "section 13" bar on the grounds that the raiding union has been the recipient of employer support. And where the employer action has resulted in a termination application, the Board may consider both its powers under section 89, and its general authority with respect to the timing, composition, and even number of required representation votes. To these express propositions, the Board adds one more by virtue of its decision in *April Waterproofing*: where the composition of the bargaining unit defined in the collective agreement is contrary to its terms because of the actions of the employer party, the Board will not consider the individuals improperly engaged to do bargaining unit work, as properly part of the unit for the purpose of a representation application. Individuals illegally hired, transferred or retained in the bargaining unit should have no more right to bring a representation application or vote in it, than they would have if they had been properly engaged in accordance with the terms of the applicable collective agreement, or if the Board had postponed a determination of their rights in a representation application until the composition of the bargaining unit is returned to what it should be.

27. The instant case, however, does not exhibit the "mischief" with which the Board was concerned in *April Waterproofing*. The employer here has not hired persons contrary to the terms of a collective agreement, improperly transferred individuals into the unit contrary to the agreement, or engaged in other activities which undermine the contractual rights of union members under the agreement by which the employer is



bound. Here, the subject employees were not “hired” at all. The individuals affected were pre-existing employees who were swept into the ambit of collective bargaining by operation of law. Nor is this a case where the employer has manipulated its employee list, withheld information from the union or the Board, or sought to mislead the union with respect to its employee complement to gain the advantages of unionization, only to take a different position in a subsequent termination application. There was no positive action by the employer here which would raise any concerns or call into play the reasoning of the Board panel in *April Waterproofing*. And, given the uncertainty surrounding the rights and status of the individuals affected by this application, we are not prepared to conclude that the fact that Culliton kept them in its employ constitutes improper interference or support which prejudices their right to seek termination of the union’s bargaining rights. While there may be cases where the retention of employees, despite a challenge to their status, may warrant careful scrutiny by the Board lest the employer is “padding the list”, we are not convinced that this is one of them. Nor are we satisfied that the approach in *April Waterproofing* should be adopted here.

28. For the foregoing reasons, the Board finds that the five individuals named on the employee list filed by Culliton are employees in the bargaining unit within the meaning of section 57(2) of the Act. The Board is further satisfied that no less than forty-five per cent of such employees have voluntarily signified in writing that they no longer wish to be represented by the union. It is entirely understandable why these employees would be opposed to trade union representation which was not only thrust upon them unwillingly, but also involved in initial effort by their bargaining agent to have them all fired. Their negative reaction is hardly surprising.

29. Pursuant to section 57(3) of the Act, a representation vote will therefore be directed among such employees so that the Board may satisfy itself by that means, that the majority of the employees desire that the right of the trade union to bargain on their behalf be terminated. Finally, the Board notes that all of the subject employees are now members in good standing of the union so that no question here arises about postponing the taking of the representation vote until the composition of the bargaining unit is in accordance with the requirements of the collective agreement.

30. A representation vote will be taken among the employees. Those entitled to vote will be all journeymen and sheet metal apprentices in the employ of Culliton in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, on the date hereof, who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date on which the vote is taken.

31. The matter is referred to the Registrar.

## **DECISION OF BOARD MEMBER H. KOBRYN;**

1. This is a construction industry case dealing with extension of bargaining rights which involves persons who are employed by an employer bound by the provincial agreement of the Ontario Sheet Metal Workers’ Conference who were not

members of the union that is the bargaining agent at the time of their application for termination of this union's bargaining rights.

2. First and foremost, we have no Rand formula in the construction industry and this is confirmed by section 43(1) which reads as follows:

*Except in the construction industry and subject to section 47, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith.*

(emphasis added)

The Legislature, by putting in that exclusion to the construction industry in section 43, recognized that the construction trade unions did not require this provision because all their present agreements included the close shop provision.

3. Where the trade union is the bargaining agent for the employees, all employees have to be members of that trade union to be in the bargaining unit, as a condition of employment.

4. There is no doubt that section 137(2) extended the bargaining rights of the union – same is quoted below:

137.-(2) Where an employer is represented by a designated or accredited employer bargaining agency, *the employer shall be deemed to have recognized all of the affiliated bargaining agents* represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions *in respect of the employees of the employer* employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

(emphasis added)

5. There is also no doubt that once the trade union has obtained bargaining rights all the employees of the employer become bound by the provincial collective agreement of the union. This is confirmed by section 145(4) set out below:

145.-(4) After the 30th day of April, 1978, where an affiliated bargaining agent obtains bargaining rights through certification or

voluntary recognition in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), the employer, the affiliated bargaining agent, *and the employees for whom the affiliated bargaining agent has obtained bargaining rights are bound by the provincial agreement* made between an employee bargaining agency representing the affiliated bargaining agent and an employer bargaining agency representing a provincial unit of employers in which the employer would have been included.

(emphasis added)

6. Section 147(2) confirms upon whom the provincial agreement is binding:

147.-(2) *A provincial agreement is, subject to and for the purposes of this Act, binding upon the employer bargaining agency, the employers represented by the employer bargaining agency, the employee bargaining agency, the affiliated bargaining agents represented by the employee bargaining agency, the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), and upon such employers, affiliated bargaining agents and employees as may be subsequently bound by the said agreement.*

(emphasis added)

7. What is a provincial agreement? This is best explained in *Manacon Construction Limited* [1983] OLRB Rep. Mar. 407, at para. 35:

A provincial agreement is, by definition, a collective agreement which, amongst other things, contains provisions respecting "... the rights, privileges or duties of ... the affiliated bargaining agents represented by the employee bargaining agency, ..." *and provisions respecting terms or conditions of employment of "... the employees represented by the affiliated bargaining agents and employed in the [ICI] sectors ..."*. Thus a provincial agreement deals with the bargaining rights held by affiliated bargaining agents represented by their employee bargaining agency. In turn, the first requirement of the definition of "affiliated bargaining agent" in section 137(1)(a), as noted at paragraph 46, is that it be a bargaining agent that "... according to established trade union practice in the construction industry, bargains separately and apart from other employees ...". From reading these two definitions together, and in the context of the requirement of section 144(1) that "... the unit of employees shall include all employees who would be bound by a provincial agreement ...".

(emphasis added)

8. Who can apply for termination of bargaining rights of the employee bargaining agency or the affiliated bargaining agents? We must go to section 57(2) which is quite specific for the answer.

*57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit, ...*

Now who are the employees in the bargaining unit defined in a collective agreement? We know that the provincial agreement is a collective agreement and we know that this employer is bound by this collective agreement. How are employees defined in this collective agreement between this employer and this union?

## ARTICLE 2 – DEFINITIONS

In this Agreement:

• • •

**2.6** “employee” means a certified journeyman sheet metal worker or registered apprentice, as well as sheeter/decker, welder, sheeter’s assistant and material handler engaged in the sheeting and decking segment of the sheet metal industry; *recognized by the local union and employed in the shop or on the job site except as otherwise specifically provided in this Collective Agreement.*

• • •

**2.8** “member” means a certified journeyman sheet metal worker; sheeter/decker, welder, sheeter’s assistant and material handler in the sheeting and decking segment of the sheet metal industry, *recognized by the local union and employed or eligible to be employed by an employer in the shop or on the job site.*

## Article 8 – Union Security

**8.1** *The employer agrees it shall be a condition of employment for all employees covered by the terms of this Agreement, to be a member of, and to maintain membership in good standing, in one of the local unions.*

(emphasis added)

From the above definitions in the collective agreement, the employees of the employer who brought this application for termination were not members of the bargaining unit defined in the collective agreement at the time the application was made. Section 137(2) is basically the key to this case, as it extended the bargaining rights of the union to the



whole province and this in turn bound the employer and the employees to the provincial agreement. This point was argued by the employer before the Court in *Inducon Development Corporation* in the Supreme Court of Ontario, Division Court before Southey, Callaghan, Fitzpatrick, J.J., released February 2, 1983 at pp. 13, 14:

"Turning to section 137(2) of the Act. The applicants submit that the interpretation given to this section by *the Board is patently unreasonable in that, again, violates a fundamental principle of the Act that ensures employers' freedom to be represented by an employer's organization of choice (Section 4)*. Section 137(2) was enacted by the Labour Relations Amendment Act, 1979, S.O. 1979, c. 113. It is part of a legislated scheme of provincial-wide bargaining in the ICI sector of the construction industry which was first introduced by the *Labour Relations Amendment Act, 1977, S.O. 1977, c. 31. Section 173(2) is a specific enactment designed to effect a province-wide extension of bargaining rights of all affiliated bargaining agents of the Carpenters and others in the ICI sectors*. Its invocation is premised on the existence of local area bargaining rights. In this case the Board has found that such rights originated with the collective agreement between Local 1669 and ICCL which terminated 30 April, 1973. The finding that these rights were not abandoned is the threshold decision and it is a decision within the Board's exclusive jurisdiction. See *Carpenters' District Council of Lake Ontario and Hugh Murray (1974) Limited and John Entwistle Construction Limited*, (1980) 33 O.R. (2d) 670 per Southey, J. at 667. This finding was not questioned in this Court. It is a finding based in part on the Board's understanding of the body of jurisprudence that has developed around the collective bargaining system in the construction industry. *Absent attack on that finding, the provisions of Section 137(2) apply automatically by operation of law*, and, the Board is given discretion in limiting the province-wide application thereof. *The interpretation is not patently unreasonable, given the wording of section 137(2)*. The legislature has provided that *"the employer shall be deemed"* to have recognized all the affiliated bargaining agents represented by a certified employee bargaining agency. *While an employer might well consider this provision an interference with its rights to collective bargaining with a freely designated representative of its employees the legislature has seen fit to limit that right in the interests of attempting to make collective bargaining responsive to the needs of the construction industry*. This section in effect provides that if an employer is bound by a provincial collective agreement anywhere in the province, that employer is now bound everywhere in the province to that agreement where it employs persons in the trades in the ICI sector of the construction industry. This is an essential part of a scheme of legislation to provide effective province-wide bargaining leading to a provincial agreement in this sector of the industry.

9. Section 137(2) was challenged in the Court, and the Court found that the Board's interpretation of this section was not patently unreasonable given its wording. The Court went on to say that absent attack on that finding (that bargaining rights had been abandoned), the provisions of section 137(2) apply automatically by operation of the law. The Court further commented that while the employer might well consider this provision an interference with its rights to collective bargaining with a freely designated representative of its employees, the Legislature has seen fit to limit that right in the interests of attempting to make collective bargaining responsive to the needs of the construction industry. These same limitations of these rights apply to unions and employees in the ICI sector of the construction industry as confirmed in *Manacon Construction Limited, supra*.

10. By the automatic operation of the law, this employer was bound by the provincial agreement of the union, and the persons he employed were also bound by the provisions of the provincial agreement. These persons employed by this employer made no effort to comply with the terms of this provincial agreement, even though they were advised by the employer on April 5, 1982 to do so. Instead, these persons went to seek counsel and then filed an application for termination of union's bargaining rights on April 26, 1982, when they were not members of the union's bargaining unit as defined in the provincial collective agreement and as specifically required by section 57(2). Since they were not members of the union's bargaining unit at the time this application was made, I find that this application is untimely and it should be dismissed.

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**0229-82-R** United Brotherhood of Carpenters and Joiners of America, Local Union 93, Applicant, v. **DI-AL Construction Limited**, Respondent, v. Group of Employees, Objectors

**Certification Where Act Contravened – Practice and Procedure – Unfair Labour Practice – Employer's involvement in petition not sufficient for invocation of s.8 – Board relying on finding of unlawful discharge by different panel – Union certified without vote**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. A. Ronson and C. A. Ballentine.

**APPEARANCES:** *Denis Power, Wilf Chretien and Wilf Clermont for the applicant; James B. Chadwick, Sylvia Corthorn and A. Malomet for the respondent; no one appearing for the group of employees.*

**DECISION OF IAN SPRINGATE, VICE-CHAIRMAN; March 18, 1983**

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

2. In a decision in this matter dated December 2, 1982 the Board defined an appropriate bargaining unit and concluded that there had been five employees in the

unit on the date that the application had been filed. Prior to the terminal date, the applicant trade union filed certificates of membership relating to two of the bargaining unit employees. These certificates indicated that the employees had both been long-time members of the union. The union also filed an application for membership signed by a third employee, Mr. F. Faubert. In its decision of December 2, 1982 the Board concluded that Mr. Faubert had signed the application for union membership after he had been mistakenly advised by a representative of the union that he was employed by another contractor working on the same job site as the respondent, and that this other contractor was required to employ only union members. The Board then went on to reason as follows:

“The evidence, when taken as a whole, raises a real concern in our minds as to whether when he signed the application for membership Mr. Faubert was indicating a desire to be represented by the union regardless of who his employer might be, and in particular whether he would have signed the document had he known that it would be used to support a certification application with respect to the respondent. In these circumstances, and given the fact that without Mr. Faubert the applicant would not have a majority of bargaining unit employees as members, we are of the view (absent consideration of the section 8 issue referred to below) that it would be appropriate for the Board to exercise its discretion under section 7(2) of the Act and obtain confirmatory evidence of employee desires by way of a representation vote.”

3. At the initial hearing in this matter, the applicant indicated that if the Board was of the view that a representation vote should be directed, rather than outright certification of the applicant, the applicant would be requesting that it be certified pursuant to the provisions of section 8 of the *Labour Relations Act*. Following the release of the Board's decision of December 2, 1982 the applicant formally requested that the Board apply section 8 of the Act, and in this regard indicated that it would be relying on both the evidence already put before the Board in these proceedings as well as the finding of a differently constituted panel of the Board in File No. 1036-82-U that the respondent had unlawfully discharged a union supporter. When the matter came back on for hearing on January 6, 1983, the applicant, after giving one day's advance notice to the respondent, alleged that in May or June of 1982 the respondent had dealt with another employee contrary to the Act. The applicant did not advance any reasons as to why it could not have raised this allegation in a more timely fashion. In these circumstances the Board ruled that the new allegations had been raised too late in the proceedings to be considered.

4. Section 8 of the Act provides as follows:

“Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section



6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

5. As the Board noted in the *Ex-Cell-O Wildex, Canada* case [1977] OLRB Rep. June 370, certification pursuant to the provisions of section 8 of the Act was designed as both a deterrent to illegal employer interference in union organizational campaigns, as well as a device to provide a meaningful and effective remedy in those cases where an employer's interference has operated to destroy the free selection process guaranteed by section 3 of the Act. The wording of the section makes clear that certification under section 8 can only be granted if three conditions are satisfied, namely:

- (i) The Act has been violated.
- (ii) The true wishes of employees are not likely to be ascertained in a representation vote, or otherwise.
- (iii) In the opinion of the Board, the applicant has membership support adequate for the purposes of collective bargaining.

6. The applicant filed uncontested membership evidence on behalf of forty per cent of the employees in the bargaining unit. This, along with the fact that in the industrial, commercial and institutional sector of the construction industry bargaining is done on a province-wide basis through designated employer and employee bargaining agencies, leads us to the opinion that the applicant has support adequate for collective bargaining. In File No. 1036-82-U the Board found that the respondent had violated the Act. Accordingly, the only outstanding issue is whether, in all of the circumstances, the true wishes of employees are now likely to be ascertained in a representation vote.

7. As indicated above, the applicant is relying on certain evidence put before the Board during the initial hearing. Much of this evidence was summarized by the Board in its decision of December 2, 1982 as follows:

“11. On April 8th, shortly after he had signed the application for membership, Mr. Faubert, on his own initiative, went and explained the circumstances under which he had signed to Mr. Ladaceur, the respondent's job superintendent. On April 13, 1982, the applicant filed a first application for certification (see file no. 0094-82-R). On April 20th, apparently in response to this application, Mr. Faubert approached Mr. Malomet, the respondent's president, to advise him that he did not want to belong to the union and to ask that he write a letter of resignation to the union on his behalf. Mr. Malomet typed out the following letter addressed to Mr. Wilfred Chretien, the business representative of the union:

‘Dear Mr. Chretien:

Further to me signing an application for membership in the carpenters union, I have reconsidered and have decided to



withdraw my application. Please return the \$1.00 fee charged and destroy my application.'

Mr. Faubert signed the letter, after which the respondent forwarded copies of it to the union and to the Board.

12. For reasons the Board was not advised of, the applicant withdrew its first application for certification, and filed the instant application on April 27, 1982. In support of the application it submitted Mr. Faubert's application for membership. Mr. Faubert testified that following the filing of the second application he again went to see Mr. Malomet and told him that he did not want the union. Mr. Malomet then wrote out a statement of desire in opposition to the application which Mr. Faubert signed. A copy of the statement was forwarded to the Board by the respondent, along with similarly worded statements signed by the two employees who had not at any point become union members."

It is perhaps also worth noting that the respondent's reply to the instant application, which was signed by Mr. Malomet, stated, in part, as follows:

"Two of my five carpenters are known union members, the other three employees are non-union, as evidenced by their signed statements, copies of which are enclosed with this application."

Accompanying the reply was a list of employees prepared by the respondent. Beside the names of the two long-time union members was written the comment: "known union member".

8. In its decision of December 2, 1982 the Board stated that given the involvement of the respondent in both the "resignation" and "statement of desire" signed by Mr. Faubert, the Board could not be satisfied that they clearly represented Mr. Faubert's true and independent wishes. The applicant is apparently of the view that the Board should go further and conclude that the respondent's involvement with the documents would serve to unduly influence Mr. Faubert's ability to vote in a representation vote. Given the particular circumstances of this case, however, I am not prepared to reach such a conclusion solely on the basis of the respondent's involvement with the two documents. Important considerations in this regard are the fact that it was Mr. Faubert who went to see Mr. Malomet, and that he did so as a direct consequence of the misrepresentation (innocent as it was) made to him by an official of the trade union. The applicant also relies on the fact that in addition to the documents signed by Mr. Faubert, the respondent forwarded to the Board statements of desire in opposition to the union's application signed by the two employees who had not joined the trade union. The Board does not have any evidence before it concerning the circumstances under which these employees came to sign the statements. However, the fact that they were sent to the Board by the respondent suggests some degree of employer involvement with them. While such employer involvement would likely be fatal to the acceptability of the documents as a voluntary expression of the two employees, I do not view it as being sufficient by itself to trigger the application of section 8. Accordingly,

I would not be prepared to certify the applicant under the extraordinary provisions of section 8 of the Act solely on the basis of management's involvement with the various statements of desire and Mr. Faubert's "resignation".

9. As already noted, the applicant is also relying on the finding of the Board in File No. 1036-82-U that the respondent violated the Act. That matter arose out of a section 89 complaint alleging that the respondent had unlawfully terminated Mr. John Holland, one of its employees who was a union member, one week after the first hearing into the certification application. In a decision dated November 12, 1982 the Board concluded that Mr. Holland had in fact been terminated because of his membership in the union. The Board then went on to direct that Mr. Holland be reinstated by the respondent with compensation.

10. A discharge is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a trade union as their bargaining agent. The respondent's action in discharging Mr. Holland because of his support for the union would have made clear to employees the depth of the respondent's opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of the discharge I doubt that the employees would now be able to freely decide for or against trade union representation. This is particularly so given the small size of the bargaining unit and the respondent's earlier conduct. In these circumstances, I am satisfied that because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a representation vote. Accordingly I am of the view that the applicant should be certified pursuant to the provisions of section 8 of the Act.

*[bargaining unit descriptions omitted – certificates issued: Editor]*

#### **DECISION OF BOARD MEMBER C. A. BALLENTINE;**

I concur with the ultimate decision of Vice-Chairman, Ian Springate. However, I believe that the union should be certified even without considering the termination of Mr. John Holland, as I believe management involvement with the various statements of desire would justify the application of section 8.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. I dissented from the decision dated December 2, 1982, and at the continuation of hearing on January 6, 1983 I gave my reasons orally to the parties. In my opinion the applicant union did not obtain its third "card" for its application by any innocent representation made by mistake. Rather, the union attempted to deliberately mislead the Board by filing a card which was fraudulently obtained.

2. The principal owner of the respondent company obviously felt that his company was being organized by fraudulent means. His demeanour at the December 6, 1982 hearing and his actions throughout are ample evidence of his feelings. And because of his anger at, and his reaction to the unlawful methods used by the union to obtain Mr. Faubert's signature, he will find his company forced to deal with a union that, on the clearest of evidence, Mr. Faubert does not want.

3. If ever there was a benefit accorded to a party because of its own illegal action, it is in this case. As I advised the parties in January, I would have dismissed the application forthwith. The very least the majority should do is give the employees a vote wherein they can advise either the union or the employer what they think of their respective behaviour.

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**0493-82-R United Steelworkers of America, Applicant, v. Fildebrandt Precision Industries Limited, Respondent**

**Bargaining Unit – Evidence – Practice and Procedure – Evidence of expert witness not permitted at hearing on LRO report – Not “new evidence” within exception in Practice Note 4 – Board finding Numerical Control Programmer sharing greater community of interest with production unit**

**BEFORE:** Corinne F. Murray, Vice-Chairman, and Board Members W. G. Donnelly and H. Kobryn.

**APPEARANCES:** *S. Michael Lynk and E. Andrew Yale for the applicant; Lynn H. Harnden, Heinz Fildebrandt and Paul Seibel for the respondent.*

**DECISION OF THE BOARD; March 9, 1983**

1. This is an application for certification. In a previous decision of the Board pursuant to an agreement of the parties, the applicant was granted interim certification for the following bargaining unit pending determination of whether G. Husk, Numerical Control Programmer, shared a community of interest with employees in the bargaining unit:

All employees of the respondent in the City of Kanata, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and numerical control programmers.

A clarity note agreed to by the parties specified that the Chief Inspector and Purchasing Agent were excluded from the bargaining unit.

2. According to the Schedules filed by the respondent, the unit described above includes the following classifications:

- Welders (3)
- Painters (3)
- Packers (2)
- Sanders (6)
- Chemical systems operator (1)



Press Brake Operators (3)  
 Machinists (2)  
 Silkscreener (1)  
 Inspector – Finishing (1)  
 Helper (1)  
 Floater (1)  
 Model Shop (1)  
 Numerical Control Operators (3)

3. The evidence upon which the Board must determine whether Mr. Husk does or does not share a community of interest with this unit is contained in a Labour Relations Officer's report (hereinafter "LRO report") dated September 22, 1982. The evidence therein was given by Mr. Husk, two of the three numerical control operators (called in support of the applicant's case) and Mr. Heinz Fildebrandt, General Manager of the respondent.

4. The applicant sought leave of the Board by letter dated September 28, 1982, and by oral representation at the January 11th hearing called to hear the representations of the parties regarding the conclusions the Board should draw from the LRO report, to adduce additional evidence via an "expert witness". The applicant relied on paragraph 14(c) of the Board's Practice Note No. 4, i.e., that the evidence to be adduced was "new evidence which could not have been discovered by reasonable diligence at the time of the examination". Alternatively, the applicant argued that the precedent-setting nature of the case warranted reopening the evidence and that the dimensions of the case only became apparent to the applicant after the receipt of the LRO report. The Board refused to grant leave because the applicant had failed to show that the circumstances of this case fell within any of the exceptions set out in Practice Note No. 4. Paragraph 6 of such Practice Note makes it clear that any party wishing to adduce evidence after the conclusion of an LRO report must show specified exceptional circumstances and the Board was not satisfied that the evidence sought to be adduced was "new evidence" within the exception in paragraph 14 (c). The Board indicated that it must decide this case on the evidence before it and that the applicant was not foreclosed from adducing expert evidence in the proper way in a future case to create suitable facts for a precedent-setting or guideline type of case.

5. The plant of the respondent is involved in the production of sheet metal parts for the computer industry. The applicant contends that Mr. Husk has a community of interest with those employees included in the unit set out in paragraph 2 above, all of whom are engaged in production work. The respondent claims that he properly belongs in an "office, clerical and technical unit" when and if one is organized by a union.

6. The duties and responsibilities of Mr. Husk are not essentially in dispute – what inferences the Board should draw from them are.

### *THE EVIDENCE*

7. Mr. Husk has been employed as the sole computerized numerical programmer or numerical control programmer with the respondent since October 1981. His educational background is 2 years at Ottawa Technical High School in a course with



drafting as a specialized subject. No evidence was given as to the educational background of the employees in the bargaining unit. His work experience previous to joining the respondent is negligible. The only training the Board knows about vis-a-vis the bargaining unit is in connection with the Computer Numerical Control operators, the name the respondent used on its schedule, also known as CNC punch press operators, the name used by the respondent during the Labour Relations Officer's investigation and during its oral representations before the Board. For ease of reference hereinafter they will be referred to as operators. One of the operators said that he received two weeks training. Mr. Husk claimed that operators could not do his job without proper training; what proper training would entail was not mentioned. No operator has ever filled in for Mr. Husk. Mr. Husk is paid on an hourly basis. All of the employees in the bargaining unit are paid on an hourly basis. There is no evidence that anyone else employed by the Respondent is paid on an hourly basis. His work hours are 8:00 a.m. to 4:30 p.m. The plant operates 6 days a week from 7:30 a.m. to 8:00 p.m. Generally, production employees work 3 days on and 3 days off from 7:30 a.m. to 8:00 p.m. One of the three operators works 8:30 a.m. to 4:00 p.m. 5 days a week. Virtually all other bargaining unit employees work 3-day shifts 7:30 a.m. to 8:00 p.m. Mr. Husk is paid overtime (time and a half) for work in excess of 40 hours per week when he is asked to work. If he works without being asked, he gets his normal hourly rate. This is the same arrangement for the operators. He punches the same punch clock in the same way as bargaining unit employees. If he is sick a day, he did not think he would be paid. Mr. Husk said his "benefits" were the same as everyone else's in the plant. Mr. Husk shares an office with (the Chief Inspector,) one of the managers who oversees and directs his work. Their office, along with other "white-collar" employees and managers, is located on the second floor of the respondent's premises; the first floor is completely utilized for production work. The production employees eat in a lunchroom on the same floor as the plant operations but Mr. Husk either eats his lunch in his office or out in his car. The other employees on the second floor either eat lunch in their offices or go out for lunch. Some of the employees from the second floor go into the production employees lunchroom to use the vending machines there. Exhibit 1 shows the offices located on the second floor are those of the Treasurer, General Manager, Production Manager, Operations Manager, Comptroller, Purchasing and Sales Staff, Chief Inspector and Mr. Husk. A receptionist also works on the second floor. Mr. Husk does not wear a uniform but dresses in such a way that he can go down on the plant floor to do his work. There was no direct evidence as to whether the employees on the first floor wear a uniform or clothing similar to Mr. Husk's. Mr. Husk does no physical work but members of the bargaining unit do, e.g., the operators move blanks around and move finished products.

8. Mr. Husk said he reports to Paul Seibel, the Production Manager. Mr. Seibel in turn reports to the Operations Manager, Gerald Fildebrandt. Mr. Husk's work is routinely checked daily by Doug Adamcheck, the Chief Inspector. The people in the bargaining unit report to their respective shift supervisor (one for A shift and one for B shift) and the shift supervisor in turn reports to the Production Manager. Below the shift supervisors there are 3 foremen (Machine Shop, Welding and Paint Shop). Mr. Husk said he has 5 basic responsibilities. He said he "takes care of":

- (1) computerized numerical programming;
- (2) stock ordering for the computer;

- (3) process writing;
- (4) changes in drawings and revision changes;
- (5) documentation of the programming.

Computerized numerical programming entails Mr. Husk receiving drawings or plans from either the Production Manager, Operations Manager (when it is a model shop job, i.e., a one-run or small-run proto typical job) or the General Manager. Sitting at a computer terminal he "punches" the co-ordinates, size and shape of the punches and sheet metal required by the drawings or plans to best build the product designed. Mr. Husk describes himself, after receipt of the drawing, as being on his won to figure out the best way to make the particular piece. The result of this is a "program" which Mr. Husk "runs" to determine that no errors have been made. Presumably he is checking for his own errors rather than design errors. After he is satisfied there are no errors, the printer attached to the computer produces the hard copy of the program. After this the computer produces a set up sheet which describes the punch widths, lengths, radii and angle for each station. Mr. Husk makes a few written notations on it. A piece of paper called a "plot" showing the exact shape and size of the metal punch to scale is done by using a "plotter", separate from the computer itself. The design/ plan, the hard copy of the program, the set-up sheet and the plot are then sent to the Chief Inspector. He directs whether any changes are indicated, Mr. Husk rechecks it and re-programs to incorporate them. After the program is finalized, he runs it through the tape printer reader (which is not a computer) from which emerges a perforated paper tape usable by the machinery on the first floor. He gives the tape and complete file to the Production Manager and, depending on how quickly he needs to run production with it, the tape would either be filed in the tape files or put out on shelves from which the operators could retrieve them. The operators take the tapes from the second floor shelves to the first floor where the "blanks" of sheet metal would be readied for production. Initially a sample is run off and checked either against the plot or a previously produced sample. Mr. Husk would be on the first floor when the tape is being put into the machine only if there was a problem with the tape or with the product resulting from the tape. After there has been a determination that everything is as it should be, the tape is allowed to run until the complete order for the full product is filled. The operator's job is to ensure that the machine operates properly and a mistake does not take place, e.g., blanks folding up. Mr. Husk does not direct the operators to run the tape - this is done by the Production Manager or the Shift Supervisors. The Foremen who supervise the operators. The foremen do not supervise Mr. Husk. Any initial checking of a product run is done by persons other than Mr. Husk.

9. Mr. Husk goes down to the first floor only to check on problems that arise between the tape and the machine or to look at new types of programs that are being run. The operators appear to be the only portion of the bargaining unit with which he has any contact. Other than in the instances described above, Mr. Husk has no face-to-face or telephone contact with the operators. He estimates he only spends 1%-5% of his time in face-to-face contact with them working on the first floor and an even smaller percentage of his time in telephone communication. He never attends "production meetings" but does attend meetings with some of those working on the second floor regarding programming as far as new drawings are concerned.

10. Concomitant with Mr. Husk's programming duties he is responsible for re-programming so that changes to orders by customers, engineering departments are incorporated into a new tape. For this no consultations with any bargaining unit member are necessary.

11. Mr. Husk's second significant duty is process writing. This involves describing, in written form, exactly what steps are to be followed and in what order so that the finished product is correct. The process writing Mr. Husk does is given to and checked by the Production Manager. These production process specifications set out the steps which the operators must follow in producing the order, i.e., from initial sheeting (according to the numerical control set-up) to packing and shipping. These process specifications are kept on file and go to the first floor with the tapes when a particular product is to be run. Mr. Husk has no contact with operators either before or after the particular specification is written.

12. Mr. Husk is responsible for documenting the information as to the drawing number of the program, any revision number, the blank size, how many parts per blank should be produced, the information material used, all of which assists the Production Manager to predict accurately the materials he needs and to order the appropriate amounts.

13. Finally, Mr. Husk ensures that all the stock necessary to keep the computer running are ordered. He has no responsibility for ordering any other stock or material apart from this. He also apparently does some initiation of programming to determine the performance of the machine (e.g., "nibbling").

14. Both the operators testified that if neither Mr. Husk nor a replacement performed Mr. Husk's duties, they could run their machines using already produced tapes to fill orders. If there was a new job for which there was no appropriate tape, there is conflicting evidence as to the possibilities of operating their machines. One operator claimed it would be difficult but not impossible because the machines can be "programmed manually" while the other operator said no new jobs could be done.

#### *THE ARGUMENT:*

15. The applicant argued that Mr. Husk has a community of interest with "other technical employees" included in the bargaining unit. He did not name who these technical employees were. Using the criteria in *Usarco*, [1967] OLRB Rep. Sept. 526, the applicant claimed the following:

(1) *Nature of Work*: In reality Mr. Husk's job is that of production worker sitting behind a computer and while he has been physically removed from the production floor the scope and content of his job makes him "intimately engaged" along with the operators in production work. The intimate connection is revealed in the fact that the operators could not do any new job if Mr. Husk or a tape were not available. Counsel for the applicant described Mr. Husk as a "translator of designs" into a form which can directly be used by the operators to make a product. He indicated that the translation function was formerly performed by production workers who,



relying on a blueprint prepared by draftsmen, would direct and operate their lathe or machine in conformity with the blueprint. Mr. Husk's production of a tape omits the necessity for a blueprint and for the production workers to direct and operate their machines. The tape does this. Mr. Husk's work goes far beyond the function of a draftsman.

(2) *Conditions of Employment*: Mr. Husk at all relevant times punched a time clock and was paid on an hourly basis. He was paid the same amount as the operators and had the same working hours as one of the three operators.

(3) *Skills*: The report is not clear and does not reveal a vast difference in the skill level of Mr. Husk and the production employees.

(4) *Administration*: Mr. Husk is ultimately responsible to the same manager as the production employees. The intermediate supervisor may be different but this is not a significant difference because office employees may have different intermediate supervisors.

(5) *Geographic Circumstances*: Not relevant or a secondary consideration.

(6) *Functional Coherence*: While there is limited person to person contact between the operators and Mr. Husk, this is not significant and is explainable by the presence of the computer. It is clear that Mr. Husk reports to the production manager on output and output is dependent on the operators. Without Mr. Husk and his tapes the operators cannot function and no production takes place.

Counsel for the applicant acknowledged that he found no case aside from *Usarco* on point.

16. The respondent argues that the following *Usarco* criteria should be followed but to different effect.

(1) *Nature of Work*: The respondent disputes that Mr. Husk is performing a traditional production function.

(2) *Conditions of Employment*: Most of the other production employees are on a 3 days on, 3 days off schedule with 12½ hour shifts; only one employee is on record as working only days 5 days a week. Mr. Husk's method of payment was essentially different from the production employees in that he had a prospect of becoming salaried if he earned it. These were his terms and conditions from his first day of work and they are different from the production employees. Mr. Husk has a dual reporting relationship, i.e. to both the Chief Inspector and the Production Manager, neither



of which are the direct supervision of the operator. The only similarity between Mr. Husk and the bargaining unit employees is with respect to the operators, but their conditions of work are materially different because Mr. Husk performs no manual work, which the operators do.

(3) *Skills*: The record is clear that the operators required only two weeks to learn their jobs and there is an inference to be drawn that this contrasts sharply with the training and skills necessary to do Mr. Husk's job.

(4) *Functional Independence*: There is minimal or limited contact and there is no "give and take" between Mr. Husk and the production employees. Mr. Husk merely goes to the production area on a different floor to observe how a program is running or to deal with a problem. He attends no production meetings, whereas he does attend office staff meetings. There is not a team approach in the sense the applicant submits because Mr. Husk can make changes to the program which production employees would not in all probability notice had taken place. The importance which Mr. Husk's work has in the production process is no different than designers, engineering staff or anyone else whose work affects the design function. In a large operation Mr. Husk's function would be carried out by a number of people, i.e., computer programmers with key punch operators. There is no evidence of any transfers between the production employees and Mr. Husk's function.

17. While acknowledging there were no decisions on point the respondent cited:

*R.C.A. Limited*, [1980] OLRB Rep. Sept. 1316

*Inglis Limited*, [1976] OLRB Rep. June 270

*York University*, [1975] OLRB Rep. July 554

*Comtech Group Limited*, [1974] OLRB Rep. May 291

*Automatic Electric (Canada) Limited*, [1969] OLRB Rep. Feb. 1969, p. 1162

as instances where the Board has found that technical employees share a community of interest with clerical and office staff. None of them deal with situations where it was argued that "technical" employees shared a community of interest with "production" employees.

#### THE DECISION:

18. The applicant's argument is premised on the notion that if the work performed by the incumbent could be determined to be what production workers have historically done, then the Board should include the incumbent in the bargaining unit. This

argument asks the Board to adopt a proprietary approach to the determination of the incumbent's community of interest in an application for certification. This appears from our reading of Board jurisprudence, to be a new type of test.

19. Counsel for the parties correctly reported that they had found no decision dealing with the circumstances before us. In view of this, it appears to be necessary to this decision to examine the facts in light of the factors, and reasoning behind them, which led to the Board's longstanding policy of segregating production units from non-production units (i.e., office, sales and later technical).

20. The Board since 1946 has consistently certified "production" workers separately from "other" employees, even where the parties have agreed to one unit with both types of employees (see Reed, *White-Collar Bargaining Units* (1969), The Industrial Relations Centre, Queen's University, Kingston, Ont. at p. 3). Included within the office unit were not only those that perform the usual office functions but also "technical" employees (see *Automatic Electric*, [1969] OLRB Rep. Feb. 1162; *Daily Journal Record*, [1966] OLRB Rep. Sept. 397; *Westeel Roscoe Co. Ltd.*, [1978] OLRB Rep. Nov. 1125). Only in exceptional circumstances were so-called technical employees formed into units separate both from the production unit and office units (see *Ex-Cello-O Corp.*, [1974] OLRB Rep. Aug. 543 and *Westeel-Rosco Co. Ltd.*, *supra*) because of the Board's stated aversion to fragmentation.

21. For over 15 years the Board has generally included Quality Control Technicians in production units because they normally have a greater community of interest with production employees than with the employees in an office, clerical and technical unit (see *Affiliated Medical Products*, [1969] OLRB Rep. Jan. 1014). This conclusion regarding their community of interest is based on a consideration of the following factors:

- (1) the respondent's organization and administration
- (2) intermingling and interchange
- (3) geographic location of work
- (4) kinds of skills, responsibilities and interchangeability
- (5) conditions of employment

(see *Alma Paint & Varnish Company*, [1968] OLRB Rep. Sept. 551).

22. Similarly, during the same space of time, the Board has generally included plant clerical staff in the production unit instead of the office unit because of the fact that they directly "service" the production unit and because their community of interest lies with the production unit (see *Wakefield Lighting Limited*, [1965] OLRB Rep. May 143).

23. The factors used in *Alma Paints* and other cases following it dealing with quality control technicians are virtually the same as the factors enumerated in *Usarco*, *supra*, as being relevant to the assessment of community of interest in geographically separate work locations. The one exception is the explicit reference to functional

coherence and interdependence. This aspect is, however, implicit in a consideration of “intermingling and interchange” and “kinds of skills, responsibilities and interchangeability”.

24. Prior to considering the effect of the evidence in light of these factors, we feel that it is necessary to re-state the basis for the Board's concern that a community of interest exists among all the bargaining unit members.

... Where a community of interest is lacking, there is the distinct possibility that the bargaining agent will not be able to reconcile the disparate interest groups within the unit. If the bargaining agent is not able to represent effectively all groups within the unit, there is a good chance that this will affect the viability of the collective bargaining relationship itself. Community of interest is determined by the consideration of a number of factors and undue significance should not be attached to any one of them. (*Adams Furniture Co.*, [1975] OLRB Rep. June 491)

25. The factors identified in both *Usarco, supra* and *Alma Paints, supra*, to assist the Board in determining the community of interest deal in part with matters which lie at the very heart of collective bargaining. For example, if the conditions of employment are substantially different between an individual or group of individuals and another group, their combination in one bargaining unit may create such serious dissonance in collective bargaining as to make the efficient conclusion of a collective agreement without a labour strife less likely. The preamble of the Act indicates that the promotion of harmonious collective bargaining is one of the aims of the Act. The creation of an obviously unharmonious or a difficult to harmonize bargaining unit would not be a fulfilment of the Board's mandate. The factors identified also ensure that there is an underlying unity of interests among the employees in the bargaining unit. Where one group has little work-related contact with another group or where the skills of one group are vastly different from another, there could be significant gaps in each group's understanding of the other's goals in collective bargaining and could create conflict within the bargaining unit. Obviously, no one factor can be identified as all important in every case nor can an absolute grading in importance among the factors be done because each work place can vary so greatly from another. For example, if differences in conditions of employment were ultimately determinative of community of interest, the compensation package could be manipulated to create distinctions where none, relative to collective bargaining, exist.

26. The factor the Board considers most indicative of a community of interest in this case is the similarity in conditions of employment between Mr. Husk and the operators in terms of the compensation package and hours of work. These are the building blocks for any collective agreement and the homogeneity of these conditions is highly persuasive. The Board notes that there was evidence given by Mr. Husk and the respondent about future changes in the method of paying Mr. Husk, i.e., from hourly to a salaried basis. The Board has maintained a policy of refusing to look at predicted or future facts in determining the issue of community of interest; therefore we have not considered potential differences in Mr. Husk's compensation package as compared with those in the production unit. The similarity in the compensation package shows that management considers them in the same league or echelon. The very fact that Mr. Husk punches a time clock underlines this status. The fact that one operator and a few



other bargaining members can work 8:30 a.m. to 4:00 p.m. shows that Mr. Husk's hours of work are not dissimilar from the bargaining unit.

27. The organizational structure reflects that Mr. Husk is more closely aligned with production because he reports to the Production Manager, not the Chief Inspector. The inference which can be drawn from this relationship is that the Production Manager requires direct responsibility over Mr. Husk to co-ordinate and effect production. The Chief Inspector plays only a supporting role in this and it would be clearly be inappropriate to have a key person whose work directly impacts on production reporting to an anyone else but the Production Manager. The fact that there is no intermediate supervision comparable to the shift supervisors is more reflective of the size of the respondent's operations than indicative of a difference in community of interest.

28. We do not consider the fact that Mr. Husk does not attend "production" meetings as significant in view of the direct reporting relationship between Mr. Husk and the Production Manager. The "production" meetings could deal with aspects of production with which Mr. Husk would have little familiarity or could be relating to areas of production over which Mr. Husk could have no input or control. Any delays in production caused by irregular or incorrect tapes or any improvements or changes to the preparation of tapes could and probably would be dealt with between the Production Manager and Mr. Husk directly, with or without the Chief Inspector. Therefore Mr. Husk's absence from so-called "production" meetings does not indicate that Mr. Husk has little or no community of interest with the bargaining unit.

29. The location of Mr. Husk's office on the second floor and the fact that his presence on the first floor is less than 5% do not reverse the impact which the similarities in conditions of employment has either. This is not such a complete physical separation which could lead the Board to conclude that functionally they are remote from one another and would have no understanding of each other's interests in collective bargaining. In any event this contact is no less than quality control technicians who the Board has found to be more appropriately included in the production unit where conditions of work were otherwise the same. (See *Affiliated Medical Products*, *supra*, where quality control technicians worked in a physically separate location and only entered the production area 4 times a day but had the same conditions of employment as production workers; compare with *Alma Paints*, *supra*.)

30. The differences in skills and resultant lack of interchange between the operators and Mr. Husk cannot be weighed too heavily because they are paid the same rate and the other parts of the compensation package do not reflect a substantial difference of skill level and responsibility.

31. For all these reasons we have concluded that Mr. Husk has a closer community of interest with the bargaining unit certified than with the office and sales staff excluded. Therefore, the Board will issue a certificate to the applicant for the following unit:

All employees of the respondent in the City of Kanata, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

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**1831-82-M Hamilton Civic Hospitals, Employer, v. Canadian Union of Public Employees Local 794, Trade Union**

**Arbitration – Reference – Extent of Minister's authority to appoint arbitrator under expedited arbitration provision where request made after expiry of collective agreement – Effect of statutory freeze on Minister's authority – Whether *Hospital Labour Disputes Arbitration Act* changing rights of parties**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members C.G. Bourne and S. Cooke.

**APPEARANCES:** *C. E. Humphrey, K. Dixon and E. H. Crabtree for the employer; John Elder, Peter Douglas, Stewart Heneberry and Julie Griffin for the trade union; Paul Cavalluzzo for the International Woodworkers of America.*

**DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER S.F. COOKE; March 9, 1983**

1. This is a reference from the Minister under section 107 of the *Labour Relations Act*. Section 107(1) reads:

(1) Where a request is made under section 16, subsection 44(4) or subsection 45(1), the Minister may refer to the Board any question that arises that in his opinion relates to his authority to make an appointment under any such provision that is mentioned in the reference, and the Board shall report to the Minister its decision on the question.

2. The trade union in this case has made a request for the appointment of an arbitrator under section 45 of the *Labour Relations Act*. The incident giving rise to the grievance which the union seeks to have arbitrated occurred after the expiry of the collective agreement but at a time when the statutory freeze provisions of section 13 of the *Hospital Labour Disputes Arbitration Act* were in effect. The question referred is "whether or not the Minister has the authority to appoint a single arbitrator where no collective agreement is in operation between the employer and the trade union."

3. Mr. Paul Cavalluzzo appeared at the hearing on behalf of the International Woodworkers of America and asked to be given "amicus curiae" status. He advised that his client had made a request for the appointment of an arbitrator under section 45 of the *Labour Relations Act* in circumstances identical to those obtaining in this case and had also been refused. He produced a letter which he had written to the Minister on October 29, 1982 protesting his failure to appoint. Counsel for the trade union in this matter took the position that Mr. Cavalluzzo should be heard. Counsel for the employer had no objection and accordingly, we ruled that Mr. Cavalluzzo could make submissions on the legal issue before us.

4. The relevant provisions of the *Hospital Labour Disputes Arbitration Act* are:

2. (1) This Act applies to any hospital employees to whom the *Labour Relations Act* applies, to the trade unions and councils of

trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

(2) Except as modified by this Act, the *Labour Relations Act* applies to any hospital employees to whom this Act applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

13. Notwithstanding subsection 79(1) of the *Labour Relations Act*, where notice has been given under section 14 or 53 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

5. The relevant provisions of the *Labour Relations Act* are:

44: (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) If a collective agreement does not contain such a provision as is mentioned in subsection (1), it shall be deemed to contain the following provision:

Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointee to an arbitration board. The recipient of the notice shall within five days inform the other party of the name of its appointee to the arbitration board. The two appointees so selected shall, within five days of the appointment of the second of them, appoint a third person who shall be the chairman. If the recipient of the notice fails to

appoint an arbitrator, or if the two appointees fail to agree upon a chairman within the time limited, the appointment shall be made by the Minister of Labour for Ontario upon the request of either party. The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it. The decision of a majority is the decision of the arbitration board, but if there is no majority the decision of the chairman governs.

(3) If, in the opinion of the Board, any part of the arbitration provision, including the method of appointment of the arbitrator or arbitration board, is inadequate, or if the provision set out in subsection (2) is alleged by either party to be unsuitable, the Board may, on the request of either party, modify the provision so long as it conforms with subsection (1), but, until so modified, the arbitration provision in the collective agreement or in subsection (2), as the case may be, applies.

(4) Notwithstanding subsection (3), if there is failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister upon the request of either party, may appoint the arbitrator or make such appointments as are necessary to constitute the board of arbitration, as the case may be, and any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement.

(5) Where the Minister has appointed an arbitrator or the chairman of a board of arbitration under subsection (4), each of the parties shall pay one-half the remuneration and expenses of the person appointed, and, where the Minister has appointed a member of a board of arbitration under subsection (4) on failure of one of the parties to make the appointment, that party shall pay the remuneration and expenses of the person appointed.

(6) Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

(7) Where a difference has been submitted to arbitration under this section and a party to the arbitration complains to the Minister that the arbitrator or the arbitration board, as the case may be, has failed to render a decision within a reasonable time, the Minister may, after consulting the parties and the arbitrator or the arbitration board, issue whatever order he considers necessary in the circum-

stances to ensure that a decision will be rendered in the matter without further undue delay.

(8) An arbitrator or the chairman of an arbitration board, as the case may be, has power,

- (c) to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;
- (d) to enter any premises where work is being done or has been done by employees or in which the employer carries on business or where anything is taking place or has taken place concerning any of the differences submitted to him or it, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any such thing or any of such differences;
- (e) to authorize any person to do anything that the arbitrator or arbitration board may do under clause (d) and to report to the arbitrator or the arbitration board thereon.

(9) Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances.

(10) The decision of an arbitrator or of an arbitration board is binding,

- (a) upon the parties; and
- (b) in the case of a collective agreement between a trade union and an employers' organization, upon the employers covered by the agreement who are affected by the decision; and
- (c) in the case of a collective agreement between a council of trade unions and an employer or an employers' organization, upon the members or affiliates of the council and employer or the employers covered by the agreement, as the case may be, who are affected by the decision; and
- (d) upon the employees covered by the agreement who are affected by the decision,



and such parties, employers, trade unions and employees shall do or abstain from doing anything required of them by the decision.

(11) Where a party, employer, trade union or employee has failed to comply with any of the terms of the decision of an arbitrator or arbitration board, any party, employer, trade union or employee affected by the decision may, after the expiration of fourteen days from the date of the release of the decision or the date provided in the decision for compliance, whichever is later, file in the office of the Registrar of the Supreme Court a copy of the decision, exclusive of the reasons therefor, in the prescribed form, whereupon the decision shall be entered in the same way as a judgment or order of that court and is enforceable as such.

(12) *The Arbitration Act* does not apply to arbitrations under collective agreements.

45. (1) Notwithstanding the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement may request the Minister to refer to a single arbitrator to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after thirty days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(3) Notwithstanding subsection (2), where a difference between the parties to a collective agreement is a difference respecting discharge from or other termination of employment, a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after fourteen days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

(4) Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him,

including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

(5) Where a request or more than one request concerns several differences arising under the collective agreement, the Minister may in his discretion appoint an arbitrator under subsection (4) to deal with all the differences raised in the request or requests.

(6) The Minister may appoint a settlement officer to confer with the parties and endeavour to effect a settlement prior to the hearing by an arbitrator appointed under subsection (4).

(7) An arbitrator appointed under subsection (4) shall commence to hear the matter referred to him within twenty-one days after the receipt of the request by the Minister and the provisions of subsections 44 (6), (7), (8), (9), (10), (11) and (12) apply, with all necessary modifications, to the arbitrator, the parties and the decision of the arbitrator.

(8) Upon the agreement of the parties, the arbitrator shall deliver an oral decision forthwith or as soon as practicable without giving his reasons in writing therefor.

(9) Where the Minister has appointed an arbitrator under subsection (4), each of the parties shall pay one-half of the remuneration and expenses of the person appointed.

(10) The Minister may establish a list of approved arbitrators and, for the purpose of advising him with respect to persons qualified to act as arbitrators and matters relating to arbitration, the Minister may constitute a labour-management advisory committee composed of a chairman to be designated by the Minister and six members, three of whom shall represent employers and three of whom shall represent trade unions, and their remuneration and expenses shall be as the Lieutenant Governor in Council determines.

(11) This section does not apply to a collective agreement in operation on the day this section comes into force but applies to every collective agreement that is renewed or made after that date.

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(3) Where notice has been given under section 53 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 44 applies with necessary modifications thereto.

6. Counsel for the trade union maintains that while section 10 of the *Hospital Labour Disputes Arbitration Act* is in operation all of the incidents of the collective bargaining relationship are preserved including the right to have the terms and conditions of employment which are frozen enforced at arbitration. *Truck Crane Service Ltd. and International Union of Operating Engineers, Local 793*, (1973) 4 L.A.C. (2d) 250 (O'Shea) and *Hamilton Civic Hospitals and Ontario Nurses' Association*, (1981) 30 L.A.C. (2d) 113 (McLaren) are cited in support of this proposition. The union argues that section 45 of the Act, the section under which the request for the appointment of an arbitrator was made, is a remedial section designed to provide a more expeditious process than that provided under section 45 of the Act. The union characterizes the process established under section 45 as a complete alternative to that provided under section 44 of the Act and argues that there are strong policy reasons for so finding. The union maintains that there is no sound policy reason for finding that the two sections do not coexist at all times. The union maintains that the prefacing words "the party to a collective agreement" used in section 45 are intended to limit who may apply for the appointment of an arbitrator under the section but not to restrict the time as of when an application can be made to the period during which a collective agreement is in operation. The union refers to *St. Joseph's Health Centre and C.U.P.E., Local 1144*, (July 7, 1981), unreported, (O'Shea) and *Misco Insulation Company Limited*, [1982] OLRB Rep. Sept. 1343 in support of its interpretation of section 45 of the *Labour Relations Act*. The union takes the position that the finding in *Milltronics Ltd. and United Electrical, Radio and Machine Workers, Local 567*, (1981) 30 L.A.C. (2d) 393 (Willes) that section 45 is available to the parties only during the life of the collective agreement is wrong and asks us to so find.



7. Mr. Cavalluzzo adopted the submissions of the union. He emphasized the absence of any policy reason for not allowing the two processes to coexist and argued that the need to deal with alleged alterations to the terms and conditions of employment which are frozen under section 79 of the Act in an efficacious manner, so as not to interfere with collective bargaining, is a strong policy reason for allowing access to the process established under section 45 during the statutory freeze period. He referred to sections 16 and 17 of the Act as sections which, although open to the "parties", are not restricted to the parties to a subsisting collective agreement. Finally, he argues that under section 79(3) breaches of the statutory freeze are to be dealt with "as if the collective agreement was still in operation." In his view the express reference to section 44 only in section 79(3) should not be read, as it was in the *Milltronics Ltd.* award, *supra*, as restricting access to section 45 during the statutory freeze period. He argues that section 44 is expressly referred to because it is under that section that an arbitrator is given his statutory authority regardless of whether he is appointed under section 44 or section 45. He maintains that where the dispute involves an alleged breach of the statute it is necessary to confirm that the arbitrator has the same powers as he does when dealing with an alleged breach of a collective agreement.

8. The employer argues that once a collective agreement expires it no longer exists under the *Labour Relations Act*. Rather, section 79 of the *Labour Relations Act* or section 13 of the *Hospital Labour Disputes Arbitration Act* operates to freeze terms and conditions of employment and the other incidents of the collective bargaining relationship. It is the employer's position that once a collective agreement expires there can no longer be parties to it who can satisfy the condition precedent to the making of an application for the appointment of an arbitrator under section 45 of the Act. The employer argues that where the Act refers to the parties to a collective agreement, as in section 45 and section 53, it refers to the parties to an existing collective agreement. The employer contrasts these sections with sections 16 and 17, the two sections relied on by Mr. Cavalluzzo, which refer simply to the "parties". In further support of its position the employer points out that the right under section 79(3) is the right to arbitrate an alleged violation of subsection 1 of section 79. The employer maintains that where the process established under section 45 is designed to facilitate the arbitration of "an alleged violation of the agreement" and where the right under section 79(3) of the Act is the right to arbitrate an alleged breach of the Act, section 45 cannot accommodate the appointment of an arbitrator. The employer argues that the process to deal with these types of complaints, as is expressly provided in section 79(3), is to be found under section 44 of the Act. The employer takes the position that the decision of this Board in *Misco Insulation Company Limited*, *supra* can be distinguished in that the Board was concerned in that case with an alleged breach of a construction industry collective agreement which occurred prior to its expiry. The employer concedes that the Board properly characterized the right to have the grievance processed under section 124 of the Act as a "vested right" which continues after the agreement ceases to operate. The employer maintains, however, that that decision cannot be read as standing for the proposition that an incident occurring after a collective agreement has ceased to operate may be referred for the appointment of an arbitrator under section 45 of the Act; a section differently worded than section 124. The employer argues that the interpretation of section 45 found in *Milltronics*, *supra* is the correct interpretation.

9. The Minister asks whether or not he has the authority to appoint a single arbitrator under section 45 of the Act where no collective agreement is in operation



between the employer and the trade union. As we read the question, the Minister is referring to his authority to appoint where no collective agreement is in operation at the time the request for the appointment of an arbitrator is made under section 45 of the Act. The question, therefore gives rise to two sub-questions. Firstly, does the Minister have the authority to appoint an arbitrator under section 45 of the Act where the incident or event precipitating the grievance takes place during the currency of a collective agreement but the request for the appointment of an arbitrator takes place after the agreement ceases to operate? Secondly, does the Minister have the authority to appoint an arbitrator under section 45 of the Act where both the incident or event precipitating the grievance and the request for the appointment of an arbitrator take place after the collective agreement ceases to operate? In addition, the question posed by the Minister gives rise to a third sub-question with respect to whether or not the Minister's authority to appoint in either of the circumstances described in the two preceding sub-questions is affected by the operation of the *Hospital Labour Disputes Arbitration Act*. Both the trade union and the employer in this case are bound by the provisions of the *Hospital Labour Disputes Arbitration Act*. In replying to the question put to us by the Minister we must address each of the three sub-questions set out above.

10. We propose to deal with the first two sub-questions and to then turn our minds to whether or not the authority of the Minister to appoint is in any way affected by the operation of the *Hospital Labour Disputes Arbitration Act*.

11. Turning firstly to whether or not the Minister has the authority to appoint an arbitrator under section 45 of the *Labour Relations Act* where the incident or event precipitating the grievance takes place during the currency of the agreement but the request for the appointment of an arbitrator takes place after the agreement ceases to operate. The Board dealt with essentially the same question in *Misco Insulation Company Limited*, *supra*. That case was a referral of a construction industry grievance to the Board pursuant to section 124 of the Act. Section 124(1) reads:

Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, *a party to a collective agreement* between an employer or employers' organization and a trade union or council of trade unions may refer a grievance *concerning the interpretation, application, administration or alleged violation of the agreement*, including any question as to whether a matter is arbitrable to the Board for final and binding determination.

(Emphasis added)

The employer filed the grievance in the *Misco Insulation Company Limited* case, *supra* and the union took the position, by way of preliminary objection, that because the referral was made after the expiry of the collective agreement the Board was precluded from entertaining the matter under section 124. Notwithstanding the fact that the incident giving rise to the grievance took place during the currency of the collective agreement, the union argued that the requirement in section 124 that a referral be made by "a party to a collective agreement" must be interpreted to mean a party to an existing collective agreement at the time the referral is made.

12. The Board, in dismissing the union's preliminary objection, relied upon *Sinclair Welding Limited*, [1981] OLRB Rep. March 343, *Genstar Chemical Limited*, [1978] OLRB Rep. Sept. 835 and *Truck Crane Service Limited*, *supra*. The ratio of the Board's decision in *Misco Insulation Company Limited*, *supra* is found at paragraphs 7 and 8 as follows:

7. In the *Genstar* case, *supra*, it was concluded that,

"Our conclusion is that the policy mandated by section 37(a) [now section 45] of the Act requires that all grievances which relate to events arising during the term of a collective agreement may be submitted to arbitration, even though the grievance is not filed until after the collective agreement has expired."

The reasoning of the Board in the *Genstar* case is, in our view, applicable to the case before us. In the case before us the actual filing of the grievance was subsequent to the date when the statutory "freeze" had ceased to be operative. However, *the critical considerations have to be that the grievance is founded in an incident occurring during the existence of the collective agreement and that it is filed within the mandatory time limits provided by that collective agreement*, both of which circumstances are met in the instant case.

8. The language of section 124 must be read in the light of the general policy background of the Act. *The use of the words "a party to a collective agreement" does not have to be read as meaning "a party to an agreement existing at the time of referral" as is argued by the union. To give it that restricted reading is to ignore the fact that vested rights arose under a collective agreement to which the union was a party and the purpose of the statute as outlined in Genstar, supra, is to provide for the final and binding settlement of such disputes.* It is in that sense that the words must be interpreted.

(Emphasis added)

The interpretation of the words "a party to a collective agreement" in section 124 of the Act as adopted in *Misco Insulation Company Limited*, *supra* is equally applicable, (and for the same reasons) to the identical words found in section 45 of the Act. There is no basis upon which to distinguish the two sections for purposes of putting a different interpretation on the same words in section 45. Accordingly, where the incident or event giving rise to a grievance occurs during the life of a collective agreement, the parties to that agreement have a "vested right" in its enforcement even though the request for the appointment of an arbitrator is not made until after the agreement expires. It follows, therefore, that the Minister has the authority to appoint an arbitrator under section 45 of the Act where the incident or event giving rise to the grievance occurs before the agreement expires but the request for the appointment of an arbitrator is not made until after the agreement expires.

13. We now turn to the question of the Minister's authority to appoint under section 45 where both the event giving rise to the grievance and the referral are made after the expiry of the collective agreement. Sections 79(1) and (3) of the Act apply upon the expiry of a collective agreement where the mandatory conciliation procedures contained in the Act have not been exhausted. Section 79(1) of the Act maintains in place all of the terms and conditions of employment as well as the rights, privileges and duties of the employer, the employees and the trade union from the time as of which the agreement expires until the conciliation procedures have been exhausted. It is argued that one of the rights which is preserved under section 79(1) is the right to arbitrate where a dispute arises as to whether a term or condition of the collective agreement extended by the statutory freeze has been breached. Indeed, it was found by arbitrator O'Shea in *St. Joseph's Health Centre, supra*, that in these circumstances "the union's right as a 'party' under the expired collective agreement continued, and that the union could therefore give effect to that right by making a request for the appointment of an arbitrator under section 37(a) [now section 45] of the Act". The Ontario Court of Appeal in *Re Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association et al*, (1981) 120 D.L.R. (3d) 101, 31 O.R. 730 also concluded that the right to arbitrate is found in section 70(1) (now section 79(1)) of the Act. The court in that case was called upon to determine the time of expiry of a collective agreement in an appeal from a judicial review of an arbitration award. In discussing the effect of section 70(1) (now section 79(1)) of the *Labour Relations Act* on the expired collective agreement the court stated:

In effect, s. 70(1) provides a bridging provision in accordance with its terms. By its terms no right enjoyed by an employer or trade union can be altered except by the consent of both parties. It seems clear, for example, that where a collective agreement has expired and an employee has a grievance while the parties are engaged in bargaining, the trade union or employee would still have the right to pursue the grievance by grievance procedure and arbitration proceedings if required ...

With all due respect, we are unable to understand how the right to enforce a statutory freeze which comes into effect following the expiry of a collective agreement can be found in the section of the Act which freezes all of the incidents of the collective bargaining relationship which existed prior to the expiry of the collective agreement. In our view, the right to enforce the statutory freeze, as distinct from the collective agreement, by way of arbitration cannot be found in section 79(1). If it could be found in that section there would have been no need to enact section 79(3). The right to enforce the statutory freeze established under section 79(1) of the Act is found in section 79(3). Our task is to determine if the right extended under section 79(3) encompasses the procedures provided under section 45 of the Act.

14. Section 79(3) provides that any difference between the parties as to whether or not section 79(1) has been complied with "may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 44 applies with necessary modifications thereto". Clearly, on the language of section 79(3), either party to the collective bargaining relationship is entitled, at the very least, to proceed to arbitration under section 44 of the Act in respect of an alleged violation of section



79(1) of the Act. In addition to the right to enforce the section by way of arbitration under section 44, the section may also be enforced, as with any other substantive provision of the Act, by way of a complaint brought under section 89 of the Act. It is against the existence of these two remedial avenues that we must determine if the section can also be enforced by arbitration under section 45 of the Act.

15. We accept that the relevant language of section 79(3) can be read as precluding access to arbitration under section 45 in respect of an alleged breach of section 79(1) of the Act. In the face of the express reference to the application of section 44 and in the absence of any reference to section 45, section 79 (3) can be interpreted as limiting access to arbitration under section 44. In answer to the submission that sections 44 and 45 were intended to be parallel procedures and that the most expeditious procedure should be available to resolve grievances which arise concurrently with collective bargaining, it could be argued that the arbitration option was not intended to answer the need for urgency where an expeditious procedure is already available (a hearing is scheduled within 28 days of the filing of a complaint under section 89) but to allow the parties to select their own arbitrator where the effect of section 79(1) is to freeze all of the incidents of the collective bargaining relationship which the parties themselves have put in place. It would as part of this argument that because the parties do not select the arbitrator under section 45, as they are entitled to attempt to do under section 44, the Legislature would not have intended section 45 to apply. However, it is to be observed that if the parties are unable to agree upon an arbitrator under section 44 of the Act, the appointment is also made by the Minister.

16. Having said all of this, section 79(3) can also be read as providing access to arbitration under either section 44 or section 45. It can be argued that if the Legislature had intended to limit the arbitration option to section 44, section 79(3) would have been drafted to provide that any breach of section 79(1) "... may be referred to arbitration *under section 44* by either party as if the collective agreement was still in operation ...". If the section had been so worded there could be no dispute that the intention was to restrict the access to arbitration under section 44. However, in the absence of the qualifying words within the body of the section it can be argued that the legislature, by appending the reference to the application of section 44 in the manner that it did may not have intended it to have a limiting or restrictive effect.

17. The appended words "... and section 44 applies with necessary modifications thereto" are not required to provide access to section 44. Access to the section is provided by the words "... may be referred to arbitration by either of the parties as if the collective agreement was still in operation..." Although section 44 is framed in terms of the arbitration of differences relating to the interpretation of a collective agreement, as brought by the parties to the collective agreement, (as in section 45), the statutory direction that referrals to arbitration under section 79(3) may be made "... as if the collective agreement was still in operation..." facilitates access to arbitration under that section. If the appended reference to section 44 in section 79(3) is not intended to provide access to or to limit access to section 44, what then is its purpose? It can, in our view, be read as an expression of legislative intention that there be absolutely no doubt that all of the powers given an arbitrator in the adjudication of an alleged breach of a collective agreement apply even though the arbitrator is appointed to adjudicate an alleged breach of the statute; a function which at all other times resides exclusively with the Board. These powers, although incorporated by reference in



section 45, are set out in section 44, thereby necessitating the express reference to that section in section 79(3). If the words "... and section 44 applies with necessary modifications thereto" are given the non-restrictive, non-limiting meaning ascribed to them above, section 79(3) must be read as allowing for the referral of an alleged breach of section 79(1) to arbitration under either section 44 or section 45.

18. In the face of two possible interpretations of section 79(3) we must decide which one best serves the remedial purpose of the section and best fits within the overall scheme of the Act. The purpose of section 79(3) is to make available to the parties the option of enforcing alleged breaches of section 79(1) by way of arbitration. Where the Act provides two procedures which at all other times are equally available, where one of the two procedures is designed to be more expeditious than the other and where the section comes into force at a time when crisis bargaining may occur and there may be a practical labour relations need for an expeditious resolution to an alleged breach of the statutory freeze, it seems to us that the Legislature, having provided an arbitration option, would not have intended to deny access to the more expeditious arbitration procedure. It seems to us that the Legislature, having provided the option of enforcing section 79(1) by way of arbitration, would have intended to provide access to both of the arbitration procedures under the Act. Accordingly, we adopt the interpretation of section 79(3) that provides access to arbitration under section 44 and section 45 of the Act.

19. For purposes of dealing with an alleged breach of section 79(1), application may be made for a referral under section 45 by the parties to the expired agreement who, if meaning is to be given to the statutory direction in section 79(3) that the alleged breach of section 79(1) may be referred to arbitration "as if the collective agreement was still in operation", must be considered as the parties to the collective agreement within the meaning of the condition precedent to the appointment of an arbitrator under section 45. Similarly, if effect is to be given to these words, the subject matter of the difference between the parties must be treated as if it was a "difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement" as those words are used in section 45.

20. We now turn to the third sub-question which we posed at paragraph 9 herein. Under section 2(2) of the *Hospital Labour Disputes Arbitration Act* the *Labour Relations Act* applies to employees covered by the *Hospital Labour Disputes Arbitration Act*, and their unions and employers, except as modified by the *Hospital Labour Disputes Arbitration Act*. Section 13 of the *Hospital Labour Disputes Arbitration Act*, which provides for a statutory freeze triggered by the same condition precedent and identical in the scope of its application to that provided under section 79(1) of the *Labour Relations Act*, is made to operate "notwithstanding subsection 1 of section 79 of the Act". The only substantive difference between the freeze created under section 13 of the *Hospital Labour Disputes Arbitration Act* and section 79(1) of the *Labour Relations Act* pertains to its duration. There is no provision in the *Hospital Labour Disputes Arbitration Act* for the enforcement of the freeze under section 13 of that Act.

21. We read the prefacing words "notwithstanding subsection 1 of section 79" in section 13 of the *Hospital Labour Disputes Arbitration Act* as a statutory direction that where section 13 of the *Hospital Labour Disputes Arbitration Act* and section 79(1) of

the *Labour Relations Act* are in conflict, section 13 of the *Hospital Labour Disputes Arbitration Act* applies. However, as we have observed, there is no conflict between the two sections in respect of the scope of the freeze so that under section 2(2) of the *Hospital Labour Disputes Arbitration Act* section 79(1) of the *Labour Relations Act* applies with the same force and effect, for purposes of the scope of the freeze, as section 13 of the *Hospital Labour Disputes Arbitration Act*. There is no enforcement mechanism under the *Hospital Labour Disputes Arbitration Act*, and accordingly, under section 2(2) of the *Hospital Labour Disputes Arbitration Act* section 79(3) of the *Labour Relations Act* applies to those covered by the *Hospital Labour Disputes Arbitration Act* and provides the option of enforcing the substantive terms of the freeze by way of arbitration, finally, there is nothing in the *Hospital Labour Disputes Arbitration Act* to modify the operation of section 45 in respect of unions and employers covered by the *Hospital Labour Disputes Arbitration Act* so that it too applies by virtue of section 2(2) of the *Hospital Labour Disputes Arbitration Act*.

22. Having regard to the foregoing, we are satisfied that the authority of the Minister to appoint an arbitrator under section 45 of the Act is not affected by the provisions of the *Hospital Labour Disputes Arbitration Act*.

23. The question referred to us is "whether or not the Minister has the authority to appoint a single arbitrator (under section 45 of the Act) where no collective agreement is in operation between the employer and the trade union." Our advice to the Minister is, firstly, that he has the authority to so appoint where the incident or event giving rise to the grievance occurs during the term of the agreement but the request for the appointment of an arbitrator is not made until after the agreement has ceased to operate, and secondly, that he also has the authority to appoint where the incident or event giving rise to the grievance occurs after the expiry of the collective agreement and during the section 79(1) statutory freeze period. Finally, our advice to the Minister is that his authority in this regard is not affected by the operation of the *Hospital Labour Disputes Arbitration Act*.

#### **DECISION OF BOARD MEMBER C. G. BOURNE;**

1. I agree with Alternate Chairman Burkett that the Minister may appoint an arbitrator under section 45 of the Act when the incident or event giving rise to the grievance occurs during the term of the agreement but the request for the appointment of the arbitrator is not made until after the agreement has ceased to operate. I do not agree that the Minister may appoint an arbitrator under section 45 when the incident or event occurs during the statutory freeze period.

2. The clear wording of section 79(3) of the Act restricts the remedies available to what is outlined in section 44. The clear wording of section 45 restricts the jurisdiction of the Minister to a situation where the event or occurrence giving rise to the grievance arose during the life of a collective agreement.

3. I would advise the Minister that he does not have the authority to appoint an arbitrator under section 45 of the Act in this case.

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**1793-82-U** Christian Labour Association of Canada, Complainant, v. Peter Nursing Home Limited, carrying on business as **Heritage Manor Rest Homes**, and Marian Peter, Respondents

Change in Working Conditions – Discharge for Union Activity – Interference in Trade Unions – Unfair Labour Practice – Pattern of harassment, discipline, lay-off, discharge, surveillance and alteration of working conditions preceding and following certification of union – Board finding series of violations – Directing extensive remedial measures

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members C. G. Bourne and B. L. Armstrong.

**APPEARANCES:** *Owen V. Gray, Frank Kooger, and Debbie McEllistrum for the applicant; James E. Bowden, Marian Peter, and H. Peter for the respondents.*

**DECISION OF THE BOARD;** March 30, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that the respondent has contravened sections 66, 70, 79, and 80 of the Act.

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3. In a decision dated February 11, 1983, another panel of the Board ruled on certain objections raised by counsel for the respondents with respect to the enlargement of the original complaint by the complainant, and the order of proceeding. In that decision, the Board ruled that all of the complainant's allegations should be combined and heard together and that the complainant should be allowed to proceed first. It was also noted in paragraph 9 of that decision that counsel for the respondents objected to that panel's jurisdiction to make a procedural ruling that the complainant proceed first, when that panel was not remaining seized of the matter for the purpose of hearing the merits of the case, as it was counsel's position that the panel could not decline jurisdiction after having made a procedural ruling. However, counsel for the respondents did not pursue those objections before the present panel of the Board at the hearing of the merits of this complaint in Chatham, Ontario on February 28, March 1, 2, and 3, 1983. Indeed, he expressly concurred with the view that it would be in the best interest of all concerned parties to have this matter heard on the merits and decided by the Board as expeditiously as possible.

4. A number of the complainant's allegations pertain to section 66, the material parts of which provide as follows:

"No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a



member of a trade union or was or is exercising any other rights under this Act;

• • •

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.”

In cases involving section 66, the Board is not primarily concerned with the fairness or lack of fairness in the conduct of the employer. Rather, the Board’s concern is whether the conduct of the employer was in any way tainted by anti-union motivation. Nevertheless, in making that determination, the Board must consider all of the surrounding circumstances. As indicated in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

“In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer’s actions lie within his knowledge. The Board, therefore, in assessing the employer’s explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer’s knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other ‘peculiarities’ (See *National Automatic Vending Co. Ltd.* case, 63 CLLC 16,287). . .”

(See also *Charterways Transportation Limited*, [1982] OLRB Rep. Jan. 5; *Sonic Transport Systems Limited*, [1981] OLRB Rep. Oct. 1483; *ABC Day Nursery and Kindergarten Limited*, [1980] OLRB Rep. April 391; and *Fielding Lumber Company*, [1975] OLRB Rep. Sept. 665.) Similar principles apply to section 80 of the Act, which is designed to ensure that persons may testify or otherwise participate in proceedings before the Board without fear of recrimination by an employer, a trade union, or a person acting on behalf of an employer or a trade union (see, for example, *The International Association of Bridge, Structural and Ornamental Ironworkers*, [1982] OLRB Rep. Oct. 1487).

5. The complainant’s allegations also include a number of alleged contraventions of section 79 of the Act. The Board summarized the purpose and effect of the “freeze” imposed by that statutory provision as follows in *A E S Data Limited*, [1979] OLRB Rep. May 368, at paragraph 10:

“The purpose of section 70 [now section 79] is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement. This ensures that



they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda. The status quo includes not only the existing terms and conditions of employment but also any other established benefits which the employees are accustomed to receive, and which can therefore be considered to be 'privileges'. It is clear that express promises, or a consistent pattern of employer conduct, can give rise to such privileges and that they are caught by the statutory freeze. It should be noted, however, that section 70 also freezes the 'rights and privileges' of *the employer*. The section requires *both* parties to maintain the existing pattern of their relationship, that is, to conduct their business as before. In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Oct. 859, the Board discussed the effect of section 70 in the following way:

The 'business as before' approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit."

6. The complainant also relies on section 70 of the Act which provides:

"No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act."

7. There were a number of disparities, contradictions, and inconsistencies in the evidence adduced in these proceedings. After carefully considering the testimony of the twelve witnesses who gave evidence before us and the extensive documentary evidence introduced through those witnesses (or received by the Board on the consent of the parties), we have made the findings of fact contained in this decision based upon our weighing of that evidence, in the light of our assessment of the relative credibility of

the various witnesses, having regard to factors including the firmness of the witnesses' respective memories, their ability to resist the influence of interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and what inferences may reasonably be drawn from the totality of the evidence.

8. The respondent Marian Peter and her husband own the respondent Peter Nursing Home Limited, which owns and operates Heritage Manor Nursing Home (the "Home") in Blenheim, Ontario. The Home was acquired by the respondent company in March of 1981. It provides food, shelter, and personal care for elderly persons. Although it can accommodate 47 residents, it has never achieved full capacity but rather has fluctuated between 31 and 40 residents, with an average of about 35 residents.

9. In late September of 1982, the complainant's organizational activities culminated in the filing of an application for certification with the Board (File No. 1230-82-R). That application was filed by the complainant (also referred to in this decision as the "union") on September 29, 1982. At or about that time, Mrs. Peter became aware that some of the Home's employees were dissatisfied with their wage level. As a result, she introduced a wage increase of 51¢ per hour, effective October 1, 1982, for all employees of the Home. The (Form 6) "green sheet" arrived at the Home on October 4, 1982 and was posted on the following day. Mrs. Peter was very upset about the complaint's application for certification. She walked around the Home in tears and angrily told a number of employees that she could close the Home and that the residents would have to go somewhere else because she would "go in the hole" with the union there.

10. Approximately a week after the green sheet was posted, Mrs. Peter approached Cindy McKellar during her break and told her that it would take a long time for the union to get a contract since it had taken about a year and a half at her nursing home in Tilbury. Mrs. Peter also stated that she "could close the place down and in a year and a day the union would be out of there".

11. Evidence concerning Mrs. Peter's actions following receipt of the green sheet was given in the certification proceedings (before another panel of the Board) by Debbie McEllistrum, a nurses aide who was the complainant's main employee organizer, and by Diane Kankula and Cindy McKellar, two other nurses aides employed by the respondent. Their evidence was called by the union in opposition to a petition circulated by another employee (Patricia Bedford). In rejecting the petition, that panel of the Board wrote as follows (in an unreported decision dated November 15, 1982):

"10. It is clear that from the time the green sheets were posted until October 12th, the terminal day, the owner, Mrs. Peter, kept constantly before the employees the threat of closing the operation down if the union came in. In addition, she emphasized to the employees that they would upset the patients by causing them to move elsewhere when the Home was closed because of the union. There was thus a threat of loss of employment and an attempt to

play on the employees' sympathy for the patients before the employees from the date of the posting to the terminal date. It was in this atmosphere that the petition, drawn up on the letterhead of the employer, was circulated among the petitioners. Even if we accept Mrs. Bedford's evidence that her change of heart (which, incidentally, she attributed to almost the identical concerns for cost and patient care as Mrs. Peter expressed to the employees on October 5th) had occurred on September 29th, the petition, based as she said on the green sheets, did not materialize until after Mrs. Peter's outburst in the cafeteria. Keeping that in mind together with threats and appeals made by Peter during the time when the petition was being signed, and the fact that the petition presented to the employees was drawn up on the letterhead of the employer, we find that the petition in the present case was not voluntarily signed by the employees concerned. In the circumstances, the Board declines to exercise its discretion to direct the taking of a representation vote."

(See *Re Tandy Electronics and United Steelworkers of America et al.* (1980), 30 O.R. (2d) (Div. Ct.), in which the Court indicated the extent to which prior Board decisions involving the same parties can be utilized by the Board. Leave to appeal that decision was refused by the Ontario Court of Appeal on March 10, 1980). After receiving the certificate that was issued pursuant to the Board's decision dated November 15, 1982, Frank Kooger, an Ontario Representative of the complainant, gave the respondents written notice to bargain pursuant to section 14 of the Act.

12. Unfortunately, the respondents' anti-union activities did not cease with the events which preceded the certification hearing. Following that hearing the respondents committed a pervasive series of unfair labour practices involving actual and constructive discharges, layoffs, reduction of employees' hours, alteration of terms and conditions of employment and various rights and privileges of employees, displacement of employees by members of the Peter family, and harassment, intimidation, and penalization of employees. For example, Mrs. Peter began to harass suspected union supporters by following them around the Home and closely scrutinizing their activities. Mrs. Peter's overt surveillance activities were particularly concentrated on Ms. McKellar. Although surveillance can have a legitimate application in the work place, an employer may not use surveillance to intimidate or penalize employees in respect of the exercise of their rights under the *Labour Relations Act* (see, for example, *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60). In the circumstances of this case, we find that Mrs. Peter's surveillance activities contravened sections 66, 79, and 80 of the Act.

13. At a staff meeting held at the Home on November 26, 1982, Marie Neville, an R.N. who had become the employees' new supervisor on November 22, 1982, told employees that they should be proud of the Home and the work they performed there, and that they must respect Mrs. Peter because she was the one who was "paying the bills". She also emphasized the importance of following proper procedures and warned the employees that she was going to be vigilant in ensuring that everyone did so. After concluding her comments, Mrs. Neville left the meeting and Mrs. Peter then addressed



the employees. Mrs. Peter informed the staff that she had decided to take away the employees' "kitchen privileges". Thus, they would no longer be entitled to a free meal on each shift, nor would they be permitted to use the Home's stove or kettle for preparing their meals and beverages. A charge of 40¢ per cup of coffee was also introduced at that time. Mrs. Peter informed the employees that she was making those changes "because the union was there" and also told them that they had "brought this on themselves". Mrs. Peter also announced at that meeting that since the union was in, she could no longer afford to keep on as many staff so she was going to lay off two (unidentified) employees. She also suggested that she might not renew the "St. Thomas contract", i.e., a contract under which the Home provides care for certain impecunious residents at a somewhat reduced rate paid by the government. She suggested that further layoffs might result if she decided to move the seven residents covered by that contract from the Home to another (unorganized) rest home owned and operated by the respondent company in Duart, Ontario. She reiterated that it might take the union a year and a half to get a collective agreement.

14. Subsequent to that meeting, the respondents laid off Ruth Pinese, a part-time cleaner. (The elimination of Ms. Pinese's work as a cleaner resulted from the increased use of family members at the Home, as described below.) The hours of students Debbie Want and Michelle Embury, who had each previously worked from 4:00 to 9:00 p.m. three or four days per week, were reduced for the first two weeks of December and were then eliminated altogether when they were laid off in mid December. Part-time nurses aide Becky Hillman and Helen Fysh, a nurses aide who had been employed by the Home on a full-time basis at the time of her layoff, were also laid off in December. (Although Ms. Hillman and Ms. Fysh were subsequently recalled, the two students had not been recalled at the time of the hearing of this complaint. Moreover, Ms. Fysh was given only part-time work when she was recalled.) In addition to those layoffs, cleaner Phyllis Allan was cut back from five days a week at the Home to four days a week.

15. Those layoffs, together with Mrs. Allan's cutback, reduced the number of paid hours of bargaining unit work per week by almost 100, which represented a reduction of approximately 30%. There was not, however, a proportionate reduction in the amount of bargaining unit work required to be performed. Indeed, while there was a temporary reduction (in December of 1982) of about 6% in the number of residents at the Home, the amount of work required to be performed remained relatively constant at all material times since (in the words of Mrs. Neville, who implemented the layoffs in consultation with Mrs. Peter), in December of 1982 "a couple of residents started to deteriorate and they required more care", thereby increasing the amount of work to be done. Thus, there is no factual basis for the respondents' assertion that the employees were laid off "due to shortage of work".

16. At the time of its purchase, Mrs. Peter was advised by the former owner that the Home had sufficient staff to operate at full capacity. Although the Home's "census" had declined from 40 residents in August of 1981 to 33 residents in October (and November) of 1981, the size of the Home's staff complement remained unchanged. The Home had a census of 33 residents in September and October of 1982. (Advertisements had been placed in local papers in an attempt to attract more residents but had not succeeded in increasing the Home's census.) Although the census temporarily dropped slightly further (to 31 residents) in November, it returned to 33 in December. While



Mrs. Peter may have had some concerns about the size of the Home's payroll prior to the application for certification, she took no action to reduce the workforce until after the union had been certified. Indeed, she voluntarily increased the size of the payroll in late September by giving employees a substantial wage increase (as described above). Thus, under the circumstances, we are unable to give credence to Mrs. Peter's contention that the impugned lay-offs were necessitated strictly by economic factors and were devoid of anti-union motivation. Financial statements filed with the Board indicate that although the Home experienced a net loss for the month of October (1982) for income tax purposes, its gross income for that month exceeded its actual operating expenses and it remained profitable on a "year-to-date" basis. Moreover, the Home's financial statements do not support Mrs. Peter's contention that she was "going in the hole every month".

17. Having regard to all of the circumstances, we find that the aforementioned layoffs and the reduction in working hours were contraventions by the respondents of section 66 of the Act. Those anti-union actions were intended to penalize, and did in fact penalize, not only the individual grievors who were laid off or cut back, but also the other members of the bargaining unit who suffered a substantially increased workload as a result of those actions. For example, the unlawful layoffs reduced the employee complement on the night shift from two nurses aides to a single nurses aide. Although night shift responsibility for breakfast time medications was eliminated, additional cleaning and kitchen duties were added which, in combination with the staff reduction on the shift, resulted in the nurses aides who thereafter worked alone on the night shift (including Ms. McEllistrum, Ms. McKellar, Ms. Kankula, Ms. Hillman, and Ms. Fysh) having a far greater workload than before.

18. In view of our finding that the impugned layoffs and reductions in working hours by the respondents were contraventions of section 66, it is unnecessary to determine whether those actions also contravened section 79 of the Act. We are satisfied, however, that the respondents contravened section 79 by altering employees' terms and conditions of employment, and their rights and privileges, as follows, without the consent of the complainant:

(1) wage increments, which had generally been given to each new employee after three months, six months, and one year of employment, were withheld;

(2) employees were not permitted to exchange shifts without the permission of Mrs. Peter, thereby being deprived of the privilege of exchanging shifts by mutual agreement between employees, subject only to the requirement of advising their immediate supervisor (the "R.N.") of the exchange; similarly, requests for time-off, which had previously been granted quite liberally by the R.N., required Mrs. Peter's express approval after the green sheet was posted;

(3) the scheduling of three-day weekends was eliminated thereby depriving employees who worked on a statutory holiday of the privilege of having a substitute day off with pay scheduled immediately before or after a weekend off;

(4) employees' free meal and beverage privileges were eliminated, as was their privilege of using the Home's stove and kettle to heat their meals and beverages; and

(5) a new disciplinary procedure involving written warnings, generally given by Mrs. Neville (often accompanied by Mrs. Peter) at meetings with individual employees, was introduced and applied most vigorously to employees known or suspected by management to be union supporters.

19. Some of those changes were revoked by the respondents on or about December 6, 1982 on the advice of counsel. For example, some of the employees' meal and beverage privileges were restored at that time, but the night shift nurses aide continued to be denied the "supper type of meal" which had traditionally been provided free of charge to the person working that shift. The three, six and twelve month increments that had been withheld from certain employees were also subsequently paid to them retroactively.

20. The respondents also breached section 79 by arranging to have Mrs. Peter's sons perform an increased amount of bargaining unit work, thereby displacing existing bargaining unit employees (see *Oakwood Hotel (Toronto) Limited*, [1977] OLRB Rep. Aug. 531). For example, during the first two weeks of December, her son Jerry worked a total of six shifts on the 4:00 to 9:00 p.m. "student shift", thereby reducing each of the students employed by the Home to two shifts per week. (He ceased to do that work in mid December when he temporarily left the Home to vacation with his family). Jerry Peter also "filled in" on the night shift from time to time after Ms. McEllistrum was discharged on January 25, 1983. Prior to the posting of the green sheet, Jerry had performed mostly maintenance duties at the Home such as building repairs and upkeep of the yard. (He continued to perform such maintenance work after the respondents were notified of the certification application.) Randy Schmeltz, another of Mrs. Peter's sons, began to work an increased number of hours as a cook at the Home after the green sheet was posted. Prior to the application for certification, some of that cooking had been performed by Phyllis Allan (the aforementioned cleaner). When Ms. Allan was working as a cook, the cleaning duties would be performed by part-time cleaner Ruth Pinese. After the union was certified, Ms. Allan was given only cleaning duties and was no longer given any cooking duties. Thus, Ms. Pinese was no longer called upon to perform any cleaning duties at the Home, and was laid off (as described above).

21. In addition to being contraventions of section 79 of the Act, the respondents' actions described in paragraphs 17 and 19 of this decision also breached section 66 as they were motivated at least in part by anti-union animus. Moreover, we are satisfied that the flurry of written warnings imposed upon the grievors who testified in opposition to the voluntariness of the petition in the aforementioned certification proceedings contravened not only sections 66 and 79, but also sections 70 and 80 of the Act. It is unnecessary to dilate unduly on the subject matter of those warnings which, for the most part, dealt with relatively trivial matters and represented transparent attempts to punish and harrass supporters of the complainant. For example, four written warnings were given to Ms. McKellar on December 6, 1982. She had never

before received a written warning, nor had her conduct or work performance been criticized by management in any way during her period of over two and one half years of employment at the Home. Two of those four warnings purported to be based on failures by Ms. McKellar to communicate with Jerry Peter with respect to "setting up for dinner". Mr. Peter, who was "replacing" one of the students who normally worked on that shift, was quite familiar with the day-to-day operations of the Home and, on his own admission, needed no instructions about the dinner set up. On the evidence, it is clear that the fact was also apparent to Mrs. Neville, who gave the warnings in question with the concurrence of Mrs. Peter. Moreover, it was palpably unreasonable under the circumstances to expect a nurses aide to give instructions on such a routine matter to Mrs. Peter's son. The other two written warnings which Ms. McKellar received that day also pertained to picayune matters that would not have attracted a written warning or any other disciplinary action but for the respondents' desire to penalize, harass, and intimidate Ms. McKellar in respect of her pro-union activities.

22. By late December the respondents' campaign of harassment against union supporters and the adverse atmosphere and working conditions which had been created at the Home by the respondents' illegal actions had begun to bother Ms. McKellar to such an extent that she decided to resign from the staff of the Home. Accordingly, she submitted a written resignation on December 20, 1982, effective December 23, 1982. Although she had not obtained alternate employment at the time of her resignation, she began to work at another establishment on January 11, 1983. (Ms. McKellar's resignation resulted in the recall from lay-off of Ms. Hillman and Ms. Fysh.) Having regard to all the evidence, we find that the respondents' harassment, intimidation and penalization of Ms. McKellar contravened sections 66, 70, and 80 of the Act. We also find that the respondents' illegal actions amounted to a constructive discharge of Ms. McKellar, whom we find to be entitled, in the circumstances of this case, to be offered reinstatement, with compensation for lost wages and benefits arising from her termination of employment, whether or not she accepts reinstatement.

23. Diane Kankula was also dealt with contrary to sections 66, 70, and 80 by the respondents. In addition to having her one year increment withheld and being given two written warnings (one in the Home's "communication book" and another on the Home's newly introduced "Employee Warning Record") in December for a minor incident concerning sticky floors, Ms. Kankula, who had never before been disciplined or criticized concerning her job performance at any time during her twelve months of employment at the Home, was scheduled to work an inordinate number of consecutive shifts during January and February of 1983, with relatively few days off on weekends.

24. The respondents also dealt with Debbie McEllistrum contrary to the *Labour Relations Act* in a number of respects. Ms. McEllistrum was hired by the Home on June 2, 1982 as a full-time nurses aide on the understanding that she would work only the night shift. However, when the R.N. (Bonnie Collins) advised her in mid October that Mrs. Peter had told her that she was not happy with Ms. McEllistrum's work and wanted her to be put on days so she could be "watched", Ms. McEllistrum wrote a note to Mrs. Peter in which she expressed her willingness to try other shifts. Accordingly, Ms. McEllistrum began to work all three shifts in November. Prior to the certification of the complainant but after Mrs. Peter had become aware of the fact that Ms. McEllistrum was an active union supporter, Mrs. Peter threatened Ms. McEllistrum's



job security by telling her that "if the union got in, the place was going to be closed down". Mrs. Peter also gave Ms. McEllistrum an oral warning about failing to polish the chairs at the Home, despite the fact that Ms. McEllistrum had been following all the instructions and training which she had been given by management concerning the monthly polishing of chairs. The respondents also illegally withheld (until late January of 1983) the six month pay increment that Ms. McEllistrum was entitled to receive as of December 2, 1982. In addition to the aforementioned oral warning, Ms. McEllistrum, who prior to the posting of the green sheet had received no criticism whatever from any member of management about her work performance, was further criticized by Mrs. Peter concerning a burned tea kettle for which she was not responsible. When she telephoned Ms. McEllistrum about that incident, rather than listening to Ms. McEllistrum's explanation, Mrs. Peter told her, "You've had your chance and it's almost up", and then hung up on her. Ms. McEllistrum was also given two separate warnings (along with Ms. Kankula) concerning the aforementioned minor incident involving sticky floors. The first of those warnings was written in the Home's communications book where it could be read by other employees of the Home. It appears from the evidence that this was the first time any employee had received a written warning in that fashion. Ms. McEllistrum wrote the following response to that written warning: "Mrs. Neville - I think you were misinformed about hallway floors. They certainly were scrubbed on nights December 2/82 by myself & Diane [Kankula]. You did not come to us in the morning with this complaint..." Notwithstanding that response, Ms. McEllistrum was given a second written warning about the same incident by Mrs. Neville, with the concurrence of Mrs. Peter who was present when Mrs. Neville gave Ms. McEllistrum the latter warning. Although Mrs. Peter did not say anything, she remained there throughout the meeting, "glaring" at Ms. McEllistrum. Ms. McEllistrum also received a written warning for allegedly smoking in the kitchen of the Home. She received that written warning a week after the incident was alleged to have occurred and at a time when she was unable to recall whether or not she had in fact been smoking in the kitchen on the day in question. The significance of that "misconduct" is best appreciated in the light of the fact that members of the Peter family also smoked in the kitchen from time to time, despite the "no smoking" sign posted there.

25. Ms. McEllistrum was also given a written warning for failing to make an immediate room by room search on January 10, 1983 when she discovered that one of the residents was missing. Although Ms. McEllistrum could have been more diligent on that occasion, her reasonable belief that Mrs. Peter and her son Randy had the situation under control, and the necessity of calming down a resident who mistakenly thought that she was about to die, are substantial mitigating factors. In any event, we find that management seized upon this incident as a basis for further penalizing Ms. McEllistrum for her pro-union activities, and as part of the respondents' continuing efforts to build a record against Ms. McEllistrum with a view to masking an anti-union termination of her employment. At a meeting on January 14, 1983, at which Ms. McEllistrum was given a written warning concerning that incident, Mrs. Peter made a number of highly provocative statements to Ms. McEllistrum. While Ms. McEllistrum was attempting to write her explanation of the incident on the warning form, Mrs. Peter told her in a loud, hostile voice that she did not trust her and that she was "a liar, an incompetent, not capable of looking after [herself] let alone the residents". In addition to other inflammatory statement, Mrs. Peter asked Ms. McEllistrum why she

did not get a job elsewhere. This prompted Ms. McEllistrum to ask, "If you think I'm so incompetent, why don't you fire me?" In light of all of the circumstances, we infer that Mrs. Peter was attempting to provoke Ms. McEllistrum into resigning from the staff of the Home. While no resignation was forthcoming, Mrs. Peter's intemperate remarks did succeed in provoking Ms. McEllistrum to respond in kind with anger and hostility. Following that exchange, Ms. McEllistrum refused to sign the warning form and left the office.

26. Management subsequently cited Ms. McEllistrum's "behaviour" during that meeting, together with her "past record" as a basis for suspending her without pay "pending full review of [her] employment status". During that review, management became aware of another incident involving Ms. McEllistrum. That incident and her "past record", including several alleged incidents which had never been drawn to Ms. McEllistrum's attention prior to the hearing of this matter, were put forward in these proceedings as the sole basis for the termination of her employment. Although the accounts of that incident by management witnesses contained a number of contradictions and inconsistencies, it appears that Ms. McEllistrum was negligent in the performance of her duties in that she forgot to record in the Home's "daily record book" the fact that one of the residents, who is a diabetic on a one thousand calorie diet, had for dessert a piece of apple pie which, to the knowledge of all concerned (including the resident), she should not have eaten. In their testimony before the Board, Mrs. Peter and Mrs. Neville suggested that Ms. McEllistrum was also responsible for the pie coming into the resident's possession, but their evidence concerning that aspect of the matter was contradictory, inconsistent, and unconvincing. Although we do not condone Ms. McEllistrum's negligence in failing to note the matter in the daily record book to alert the next shift of the situation, in the light of all the circumstances of this case we find that anti-union animus played a substantial role in the actions taken by the respondents against Ms. McEllistrum, including her discharge, of which she was informed on January 25, 1983 at a negotiating session which she attended as a representative of the union. Accordingly, we find that the harassment, intimidation, discipline, and discharge of Ms. McEllistrum by the respondents contravened sections 66, 70, and 80 of the Act.

27. Since counsel were in agreement that the posting at the Home of a "notice to employees" concerning his case would tend to cause unnecessary concern and anxiety among the residents of the Home, the Board will direct that a notice be mailed to employees rather than posted at the Home. In addition to the usual declaratory relief, cease and desist orders, reinstatement directions, and directions concerning compensation for lost wages and benefits, in the circumstances of this case involving repeated abuses of the respondents' scheduling powers, the Board finds it appropriate to direct the respondents to provide the complainant with a copy of each work schedule forthwith after it is posted in the Home. That direction will remain effective until the parties enter into a collective agreement or the complainant's bargaining rights are terminated.

28. In view of management's use of disciplinary meetings as a form of harassment and intimidation of union supporters in this case, the Board also finds it appropriate to direct that, until such time as the parties enter into a collective agreement or the union's bargaining rights are terminated, no representative of the respondents shall

meet with any employee in the bargaining unit for the purpose of disciplining that employee unless the employee is permitted to have with him or her at the meeting a representative of the complainant or another member of the bargaining unit selected by the employee. (It is unnecessary in this case for the Board to express any view concerning whether unionized employees have the right to such representation under the Act irrespective of such circumstances.) Furthermore, in view of the part which management meetings with employees have played in the respondent's anti-union activities, we shall also direct (as the Board did in the *K-Mart* case, *supra*) that the respondents permit a representative of the union to have access, with reasonable advance notice, to all meetings of employees called or convened by a representative of the respondents, which involve discussion of collective bargaining or representation of employees by the complainant, with equal time to be afforded the union representative to respond to statements or comments by management, such access to be provided until a collective agreement is concluded or the union's bargaining rights are terminated.

29. Thus, the Board has found that the respondents have engaged in a pervasive series of unfair labour practices directed primarily against known or suspected supporters of the complainant. Although the respondents' unlawful conduct has not prevented the complainant from obtaining a certificate, extensive remedial relief is necessary to compensate the grievors for the losses which they have suffered and to place them and the complainant as nearly as possible in the position they would have been in if the respondents had not contravened the Act. In the absence of such relief, the collective bargaining rights which flow from the certificate could prove to be nugatory. The remedies granted by the Board do not, of course, prevent the respondents from making operational changes (not precluded by the freeze) for valid business reasons devoid of anti-union animus.

30. The Board therefore declares that the respondents have contravened sections 66, 70, 79, and 80 of the *Labour Relations Act*, and hereby orders that the respondents:

- (1) cease and desist from breaching sections 66, 70, 79, and 80 of the *Labour Relations Act*;
- (2) reinstate Debbie McEllistrum, Ruth Pinese, Debbie Want, and Michelle Embury forthwith, and compensate them for all lost wages and benefits sustained through the respondents' violations of the Act;
- (3) restore Helen Fysh to full-time employment, and compensate her for all lost wages and benefits arising from her layoff and subsequent recall on a part-time rather than a full-time basis;
- (4) offer to reinstate Cindy McKellar, and (whether or not she accepts reinstatement) compensate her for all lost wages and benefits arising from her termination of employment;
- (5) compensate Becky Hillman for all lost wages and other benefits arising from her layoff;
- (6) revoke the one day reduction in the weekly days of work of



Phyllis Allan, and compensate her for all lost wages and benefits sustained as a result of that reduction;

- (7) pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note 13, dated September 8, 1980;
- (8) remove from the records of the Home and destroy all written warnings and other disciplinary notations given to the grievors during December of 1982 and January of 1983, with the exception of notations pertaining to Debbie McEllistrum's failure to record the "apple pie incident" in the Home's daily record book, which notations are to remain in Ms. McEllistrum's file as a written warning (subject to any collective agreement provision that may become applicable with respect to the removal of disciplinary notations from personnel files);
- (9) restore in totality the meal and beverage privileges and all other rights and privileges enjoyed by employees prior to the onset of the "freeze", and maintain all such rights and privileges for the duration of the freeze period;
- (10) compensate employees for the free meals and beverages which they were denied as a result of the respondents' breach of the freeze;
- (11) cease and desist from using members of the individual respondent's family to perform during the freeze period bargaining unit work to an extent beyond that which was performed by them before the onset of the freeze;
- (12) schedule for Diane Kankula a sufficient number of days off on weekends to compensate for the inordinate number of consecutive shifts that she was scheduled to work during January and February of 1983;
- (13) at their own expense, mail a copy of the attached notice marked "Appendix", after being duly signed by the respondent Marian Peter, to the residence of each person employed at the Home at any time during the period from September 29, 1982 to the date of this decision;
- (14) take all necessary steps to ensure that until such time as the complainant and the respondent company enter into a collective agreement or the complainant's bargaining rights are terminated, no representative of the respondents shall meet with any employee in the bargaining unit for the purpose of disciplining the employee unless the employee is permitted to have with him or her at the meeting a representative of the complainant or another member of the bargaining unit selected by the employee;

- (15) permit a representative of the complainant to have access, with reasonable advance notice, to all meetings of employees called or convened by any representative of the respondents, which involve discussion of collective bargaining or representation of employees by the complainant, with equal time to be afforded the complainant's representative to respond to statements or comments made by the representative of the respondents, such access to be provided until such time as the complainant and the respondent company enter into a collective agreement or the complainant's bargaining rights are terminated; and
- (16) provide the complainant with a copy of each work schedule forthwith after it is posted in the Home, until such time as the complainant and the respondent company enter into a collective agreement or the complainant's bargaining rights are terminated.

31. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

## APPENDIX

### THE LABOUR RELATIONS ACT

#### NOTICE TO EMPLOYEES

#### MAILED TO EMPLOYEES BY ORDER OF THE ONTARIO LABOUR RELATIONS BOARD

We have mailed this notice to you in compliance with an Order of the Ontario Labour Relations Board issued after a hearing in which we and the union participated. The Ontario Labour Relations Board found that we violated the *Labour Relations Act* by harassing, disciplining, and discharging Debbie McEllistrum; laying off Ruth Penese, Debbie Want, Michelle Embury, Becky Hillman, and Helen Fysh; recalling Helen Fysh to part-time rather than full-time employment; reducing by one day Phyllis Allan's weekly days of work; surveillance, harassment, and unlawful disciplining of Cindy McKellar; withholding the one-year pay increment of Diane Kankula, disciplining her twice for a minor incident, and scheduling her to work an inordinate number of consecutive shifts; arranging to have Jerry Peter and Randy Schmeltz perform an increased amount of bargaining unit work; altering employees' terms and conditions of employment and a number of their rights and privileges during the "freeze" imposed by the Act; and by other actions described in the Board's decision in this matter.

The Act gives all employees these rights:

To organize themselves;

To form, join, and participate in the lawful activities of a trade union;

To act together for collective bargaining;

To refuse to do any and all of these things.

We assure all of our employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL cease and desist from breaching the *Ontario Labour Relations Act*.

WE WILL reinstate Debbie McEllistrum, Ruth Penese, Debbie Want and Michelle Embury forthwith, and compensate them for all lost wages and benefits.

WE WILL restore Helen Fysh to full-time employment and compensate her for all lost wages and benefits.

WE WILL offer to reinstate Cindy McKellar, and will compensate her for all lost wages and benefits arising from her termination of employment.

WE WILL compensate Becky Hillman for all lost wages and other benefits arising from her layoff.

WE WILL revoke the one day reduction in the weekly days of work of Phyllis Allan and compensate her for all lost wages and benefits sustained as a result of that reduction.

WE WILL pay interest on the compensation for lost wages ordered by the Board.

WE WILL remove from the records of the Home and destroy all written warnings and other disciplinary notations given to the grievors during December of 1982 and January of 1983 (with the exception of one written warning to Debbie McEllistrum specified in the Board's decision).

WE WILL restore in totality the meal and beverage privileges and all other rights and privileges enjoyed by employees prior to the onset of the freeze and will maintain all such rights and privileges for the duration of the freeze period.

WE WILL compensate employees for the free meals and beverages which they were denied as a result of our breach of the freeze.

WE WILL cease and desist from using members of the Peter family during the freeze to perform bargaining unit work to an extent beyond that which was performed by them before the onset of the freeze.



WE WILL schedule for Diane Kankula a sufficient number of days off on weekends to compensate for the inordinate number of consecutive shifts that she was scheduled to work during January and February of 1983.

WE WILL mail at our own expense a copy of this notice to each of our employees.

WE WILL take all necessary steps to ensure that until such time as the union and the Home enter into a collective agreement, or the union's bargaining rights are terminated, no representative of the Home shall meet with any employee in the bargaining unit for the purpose of disciplining that employee unless the employee is permitted to have with him or her at the meeting a representative of the union or another member of the bargaining unit selected by the employee.

WE WILL permit a representative of the union to have access, with reasonable advance notice, to all meetings of employees called or convened by any representative of the Home to discuss collective bargaining or representation of employees by the union, with equal time to be afforded to the union's representative to respond to statements or comments made by the representative of the Home, until such time as the union and the Home enter into a collective agreement or the union's bargaining rights are terminated.

WE WILL provide the union with a copy of each work schedule forthwith after it is posted in the Home, until such time as the union and the Home enter into a collective agreement or the union's bargaining rights are terminated.

PETER NURSING HOME LIMITED  
carrying on business as  
HERITAGE MANOR REST HOME

Per Marian Peter

THIS IS AN OFFICIAL NOTICE OF  
THE ONTARIO LABOUR RELATIONS BOARD

DATED THIS 30TH DAY OF MARCH, 1983

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**0205-82-R** Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), Applicant v. **MacLeans Magazine**, Respondent

**Certification – Constitutional Law – Board finding respondent's foreign bureau personnel not employed in Ontario – Board lacking jurisdiction over persons employed outside province**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *Naomi Duguid, Linda Torney, Nick Jennings and Usa Burroughs for the applicant; M. Patrick Moran and Charles Lee for the respondent.*

**DECISION OF THE BOARD:** March 16, 1983

1. This is an application for certification in which the applicant has applied for a bargaining unit described as "all employees in the Editorial Department of MacLeans Magazine save and except the Editor, Deputy Editor, Managing Editor, Assistant Managing Editor, Senior Editor, Editorial Controller, and the secretaries to the Editor, Deputy Editor and Managing Editor, and employees regularly employed less than twenty-four hours per week and students employed during the summer vacation period. For clarity, the unit applied for includes all full-time employees currently assigned to the Ottawa, British Columbia, Alberta, Atlantic Provinces, Washington, and New York Bureaus of MacLeans Magazine".

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4. Following the issuance of the Labour Relations Officer's Report (hereinafter referred to as the "Report"), the Board scheduled a hearing for the purpose of hearing the representations of the parties with respect to that Report. After hearing the submissions of the parties concerning certain matters that arose out of the examination proceedings before the Officer, this panel of the Board, in a decision dated December 24, 1982 (reported at [1982] OLRB Rep. Dec. 1843), ruled that it would permit the parties to call certain evidence before the Board at the continuation of hearing of this matter, including evidence relevant to the threshold issue of whether or not the Board has jurisdiction over the persons who work in the respondent's Bureaus located outside of Ontario. In support of her contention that the Board has jurisdiction with respect to the Bureau personnel in question, counsel for the applicant summoned Jane O'Hara to testify before the Board. She also relied upon certain evidence contained in the Report. The respondent elected not to call any evidence concerning that issue.

5. Ms. O'Hara was employed in the respondent's New York (City) Bureau on April 26, 1982, the date on which this application was filed with the Board. Having served as the respondent's "People Editor" and as a reporter in the respondent's Ottawa Bureau, Ms. O'Hara left the employ of the respondent in the fall of 1979 to work for another publication. She was rehired by the respondent in January of 1981 and served as a senior writer in Toronto until September of 1981 when she accepted the respondent's offer to send her to New York to replace Larry O'Toole in the respondent's

New York Bureau. In discussions with Rod McQueen, the respondent's Managing Editor, and Peter Newman, who was at that time the Editor of the respondent, Ms. O'Hara was advised that she would probably be in the New York Bureau for two or three years. The respondent paid all the expenses incurred in moving the furniture, clothes and other movable possessions of Ms. O'Hara, who testified that she moved "lock, stock and barrel" from Toronto to New York City. Ms. O'Hara further testified that it is customary for the respondent to pay moving expenses for "Bureau people", although in her case there was an agreement that if she left the New York Bureau during her first eighteen months there, she would reimburse the respondent for those moving expenses, unless her departure from New York was at the request of the respondent. (It appears that this stipulation resulted from the fact that in July of 1979, Ms. O'Hara left the employ of the respondent within a few months after the respondent had absorbed the cost of moving her possessions from Toronto to Ottawa.)

6. To enable her to work in the United States of America, Ms. O'Hara obtained an "I" visa, which she described as being for employees (in the United States) of a company of their home country such as "a Canadian working [in the U.S.] for a Canadian company". While working in the New York Bureau, Ms. O'Hara continued to pay income tax only in Canada. Although she described her position as "New York Bureau Chief", that title is somewhat misleading in that she was in fact the only person employed in the New York Bureau. Her duties and responsibilities during a typical week consisted of preparing story ideas (sometimes listed on a sheet referred to as a "sched") for consideration at the editorial meeting (held in Toronto on Tuesday of each week for the purpose of determining what stories should be written for inclusion in the next edition of the weekly newsmagazine published by the respondent), speaking on the telephone with the various section editors (such as Foreign Editor David North and Entertainment Editor Ann Johnston) concerning the story ideas which they wished her to pursue, writing stories, and discussing (with the section editors) changes made in her stories during the editing process. Ms. O'Hara's "main contact" at head office was Mr. North. She estimated that "sixty to seventy per cent of [her] dealings were through him". However, she also had contact from time to time with other section editors concerning stories which they wanted her to write for their sections of the magazine.

7. Ms. O'Hara communicated with the section editors and other persons at the respondent's Toronto head office by telephone, which she used not only to carry on direct conversations, but also to transmit "scheds" and stories by means of a "fax machine" (a device which uses a beam of light to convert written words or diagrams into signals which can be transmitted over telephone lines and used to produce a facsimile at the other end of the line). Ms. O'Hara's only contact with other persons who write for the respondent in New York occurred when they occasionally used her fax machine to file stories with the respondent's head office. Since Ms. O'Hara used part of her New York residence as her office, the respondent paid a portion of her rent each month. The respondent also reimbursed her for various other business-related expenses, such as travel and telephone expenses.

8. Ms. O'Hara also spoke on the telephone about once a week to Mr. Posner, the respondent's Washington Bureau Chief. She told the Board that his terms and conditions of employment were similar to hers "except that he has an office in the press building, has a secretary and covers a lot more politics". Mr. Posner was also hired in Toronto by the respondent.



9. Ms. O'Hara moved back to Toronto from New York in October of 1982 to become the respondent's National Editor. During her thirteen month period of employment in the respondent's New York Bureau, she returned to Toronto "on a couple of occasions" for business purposes at the respondent's expense. For example, in April of 1982, upon returning to New York from a trip to Buenos Aires, Ms. O'Hara was asked by Senior Editor Angela Ferranti to come to Toronto to write some cover stories concerning the Falkland Islands. Ms. O'Hara explained to the Board that she did that writing in Toronto rather than in New York "because it was easier to write long pieces in Toronto" as she would be working in closer proximity to the editors and would have access to information provided by wire services, which information would not have been as readily available to her in New York.

10. Although none of the other Bureau personnel were called as witnesses, the Report contains some evidence concerning their employment relationship with the respondent. It appears from that evidence that most of them were hired in Toronto and sent from there to live in the cities in which their respective Bureaus are located. Although some of the persons in question, such as Ms. O'Hara, were already employees of the respondent at the time they accepted Bureau positions, others became employees of the respondent when they were hired as Bureau personnel. All of the Bureau personnel have frequent telephone contact with various section editors in Toronto and occasionally leave the cities in which they reside to go to the respondent's head office in Toronto for business purposes.

11. Counsel for the applicant submitted that the place of employment of Ms. O'Hara and the other Bureau personnel at the time of this application was Toronto. In support of that submission, she noted that Ms. O'Hara's employment contract was made in Toronto, as were most, if not all of the contracts of employment between the respondent and the other Bureau personnel in question. Drawing upon conflict of laws terminology, counsel submitted that the "proper law" of the contract between each of the Bureau personnel and the respondent was Ontario law, and that Ms. O'Hara continued to be domiciled in Ontario even though she was resident in New York. (With respect to the proper law of Ms. O'Hara's employment contract, counsel referred the Board to *Imperial Life Assurance Co. of Canada v. Colmenares* (1967), 62 D.L.R. (2d) 138 (S.C.C.).) Counsel also contended that the Bureau personnel's primary employment nexus was with Toronto rather than with the locations in which they resided and performed most of their employment duties. She likened the situation to that of a "roving reporter" who is temporarily sent from Toronto to various parts of the world to cover stories, but has an employment relationship only with an employer located in Toronto. She noted that Ms. O'Hara (and, by analogy, the other Bureau Chiefs) worked for an employer located in Toronto, not in New York State, as evidenced by the fact that Ms. O'Hara was the respondent's only employee in its New York Bureau, and the fact that virtually all supervision and direction of her activities came from Toronto by telephone. Although counsel conceded that the Board does not have power to summon any of the Bureau personnel while they are beyond the boundaries of Ontario, she nevertheless contended that a certificate including them would be enforceable against the respondent as it is located within the Board's territorial jurisdiction.

12. Counsel for the respondent submitted that the Board lacks jurisdiction to issue a certificate for a bargaining unit that includes the Bureau personnel in question because they reside and work outside Ontario. It was his contention that the Board's

jurisdiction extends only to the boundaries of the Province of Ontario. In support of his position, he referred the Board to section 92(13) of the *British North America Act* and to a number of cases, including *Toronto Electric Commission v. Snider*, [1925] 2 D.L.R. 5 (J.C.P.C.); *Labour Relations Board of New Brunswick v. Eastern Bakeries Ltd.* (1960), 26 D.L.R. (2d) 332 (S.C.C.); *Saint Paul University*, [1972] OLRB Rep. July 729; *Compagnie Miron Ltee*, [1972] OLRB Rep. Dec. 1034, request for reconsideration denied, [1973] OLRB Rep. Jan. 61; and *Sheedy and R.W.D.S.U. Local 580*, [1980] 1 CLRB 391 (C.L.R.B.). He contrasted Bureau personnel, who move “lock, stock and barrel” to the cities in which their Bureaus are located and in which they generally reside for a number of years, with roving reporters, who travel from place to place on a daily, weekly or monthly basis without establishing residency in the places to which they travel to perform their reporting duties.

13. Although the facts of this case present the Board with a somewhat novel issue concerning the ambit of its jurisdiction, there are a number of authorities which provide guidance in resolving it. It is relatively clear from the pertinent jurisprudence that an employee's place of residence is not determinative of whether or not the Board has jurisdiction over that employee. Thus, the Board has jurisdiction to grant bargaining rights with respect to employees who are employed within Ontario but reside outside the Province. See, for example, *Inter-Provincial Paving Company Limited*, [1962] OLRB Rep. Nov. 375, in which the Board wrote as follows in an application for certification in respect of certain construction labourers:

“The respondent also made certain representations with respect to *Labour Relations Board (NB) v. The Eastern Bakeries Ltd. Local Union 76 and Attorney-General of New Brunswick*, [1961] 26 D.L.R. (2nd) 332. After careful consideration we are of the opinion that there is nothing in that decision which would make it incumbent on this Board to find it was without jurisdiction in the present case. Here the applicant is seeking bargaining rights for a group of employees of a Quebec company while working on a local work or undertaking within Ontario. The Company, which incidentally maintains an address in Ottawa, divides its work between Hull and Ottawa. Some of its employees are residents of Ontario, others of Quebec. While the men are hired in Quebec, and at times work in Quebec, there is no suggestion that the Board's certificate would or should apply to employees while working outside the Province of Ontario but only while employed on local works or undertakings within the Province.”

The Board also has jurisdiction over some employees, such as taxi drivers, who perform the vast bulk of their work in Ontario, but who also occasionally perform a limited amount of work outside Ontario for their employer (see, for example, *Windsor Airline Limousine Services*, [1981] OLRB Rep. March 398, and [1980] OLRB Rep. Feb. 272, application for judicial review dismissed (1980), 30 O.R. (2d) 732 (Div. Ct.), leave to appeal denied, September 15, 1980). However, the Board has no jurisdiction to regulate the labour relations of persons who are not employed within the Province of Ontario, as indicated by the Supreme Court of Canada in *Eastern Bakeries Ltd.*, *supra*, which is the leading case concerning the limited territorial jurisdiction of

provincial labour relations boards. That case arose out of a certification application in which a Teamsters' local sought bargaining rights for drivers employed by the company at Moncton, New Brunswick. The company contended that all drivers on the payroll of its Moncton branch should be in the bargaining unit, including a number of persons resident and employed in Prince Edward Island and Nova Scotia. When the Labour Relations Board of New Brunswick confined the bargaining unit to employees working at Moncton, the employer obtained from the Appeal Division of the Supreme Court of New Brunswick an order quashing the Board's decision. In its judgment, the Appeal Division expressed the view that in the number of employees hired at the Moncton branch of the company there should be included not only those who resided in New Brunswick, but also those who resided in Nova Scotia and Prince Edward Island. On appeal to the Supreme Court of Canada, that judgment was reversed. The nine Supreme Court Justices who heard the appeal were unanimously of the view that the Labour Relations Board of New Brunswick had no jurisdiction over persons working in another province. In his reasons for judgment, Kerwin C.J.C. wrote (at page 336):

"There is no evidence as to where the hiring of the resident employees in Nova Scotia or Prince Edward Island occurred, but it does not advance the case for the respondent if it took place at Moncton. The New Brunswick Labour Relations Board can have no jurisdiction over persons residing and working outside that Province so as to declare that they are part of the membership of a unit of the company's employees residing and working in New Brunswick. The fact of proximity in the present instance does not distinguish it from the case where employees of a company in Toronto may do similar work to that of other employees of the same company in the same category residing and working in Montreal. Such latter employees could not be included by an Ontario Labour Relations Board under similar legislation in Ontario for the purpose of declaring a bargaining unit . . ."

14. The principles set out in *Eastern Bakeries*, were applied by this Board in *Saint Paul University, supra*, in which the Canadian Union of Public Employees sought bargaining rights on behalf of all office, clerical and technical employees of the University. In addition to those persons employed by the University in Ottawa, the union also sought to represent field sales representatives and members of the University's clerical staff employed and residing in Montreal at its "Montreal Services Branch". In finding that it had no jurisdiction to entertain the application insofar as it related to the Montreal-based employees, the Board quoted the passage set forth above from the judgment of Kerwin C.J.C. in *Eastern Bakeries* and found the principles set forth in that case to be directly applicable. (See also *Compagnie Miron Ltee, supra*; *P.E. Brulee Ltee*, [1964] OLRB Rep. Feb. 597; and *Dominion Materials Limited*, [1963] OLRB Rep. Dec. 517.)

15. Thus, it is quite clear from the pertinent jurisprudence that this Board does not have jurisdiction over employees who are employed outside of Ontario. The *Labour Relations Act* contains no suggestion that it is intended to have application beyond the boundaries of Ontario, nor would the Ontario Legislature have the constitutional jurisdiction to enact labour legislation having extra-territorial effect (cf., the provisions



of the *Canada Labour Code* as interpreted by the Canada Labour Relations Board and the Federal Court of Appeal in the jurisprudence summarized by that Board in *Bell Canada*, [1982] 3 Can. LRBR 113).

16. Notwithstanding counsel for the applicant's able argument on the matter, we are unable to accept her submission that this Board has jurisdiction over the Bureau personnel in question. Although they have regular contact with the respondent's Toronto head office by means of telephone conversations, and fax machine transmission and reception of written documents, the fact remains that, with the exception of occasional trips to Toronto for business purposes, Bureau personnel perform virtually all of their reporting, writing and other employment-related tasks in the cities in which their respective Bureaus are situated. It is there, and not in Ontario, that they receive virtually all of their supervision and direction by means of telephone (and fax machine) communication. Indeed, it appears that relatively little supervision and direction is required in view of their status as experienced professional writers. Unlike a roving reporter whose sojourn in a particular location will generally be measured in days or weeks, and who might legitimately be described as working "out of" his employer's headquarters, the respondent's Bureau personnel generally work and reside in a particular city for a number of years, with only occasional, relatively brief visits to the respondent's Toronto head office. Moreover, the fact that for "conflict of laws" purposes the proper law of their employment contracts may be Ontario law, does not assist the applicant's case any more than does the fact that some of them may continue to be domiciled in Ontario. Both of those legal concepts have been developed and applied by the Courts for purposes quite distinct from determining where an individual is employed and which governmental authority has jurisdiction over his employment relations with his employer. While the persons in question may have been in Ontario at the time they entered into their respective contracts of employment, and while the law of Ontario may be the proper law to be applied by a court in interpreting those contracts, that does not change the fact that the geographic locations in which they carry out virtually all of their employment obligations are outside the boundaries which define the limits of this Board's territorial jurisdiction. If bargaining rights were granted by this Board in respect of such persons and their evidence became material to an issue which arose subsequently before this Board or before a board of arbitration, they would not be susceptible to a summons issued by either tribunal. If they engaged in an unlawful strike, it is unlikely that this Board would have the jurisdiction to grant a cease and desist order which would be enforceable in the respective jurisdictions in which they work and reside. Although such considerations are not conclusive of the matter, they do serve to emphasize the tenuousness of the connection between the persons in question and the processes of this Board, including its certification process.

17. For the foregoing reasons, the Board finds that the respondent's extra-provincial personnel are employed outside Ontario and are, accordingly, beyond the jurisdiction of this tribunal. In view of that finding, it is unnecessary for us to determine whether the persons in question exercise managerial functions (as alleged by the respondent). It is also unnecessary to consider whether it would be appropriate, as a matter of labour relations policy, to include those persons in a common bargaining unit with the respondent's other Editorial Department employees.

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[Parts of the decision dealing with managerial exclusions omitted.]

27. For the foregoing reasons, the Board finds that all employees of the respondent employed in the editorial department of MacLeans Magazine, in the Province of Ontario, save and except Publisher, Editor, Deputy Editor, Managing Editor, Assistant Managing Editor, Editorial Controller, Assistant to Editor, Art Director, Assistant Art Director, Photo Editor, Ottawa Bureau Chief, Chief of Research, secretaries to the Editor, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining. For the purpose of clarity, the Board notes the agreement of the parties that associate editors, assistant editors, librarian, staff photographer, copy editor, and editorial assistant (L. Campoli) are included in the bargaining unit (as are section editors in view of the Board's findings set forth above). The Board further notes the agreement of the parties that C. Rodd, P. Ohlendorf, and D. Livingston are independent contractors and are, therefore, excluded from the bargaining unit.

28. A formal certificate will now issue to the applicant.

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**0165-82-R; 0212-82-R; 0227-82-R; 0258-82-R; 0374-82-R** United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, Applicant, v. **Manacon Construction Limited**, Respondent, v. Labourers' International Union of North America, Local 527, Intervener #1, v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, Intervener #2; United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, Applicant, v. M. Sullivan and Son Limited, Respondent, v. Labourers' International Union of North America, Local 527, Intervener #1, v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, Intervener #2, v. Labourers' International Union of North America, Local 247, Intervener #3; United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, Applicant, v. D'Angelo Plastering Company Limited, Respondent, v. Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council, and Labourers' International Union of North America, Local 527, Interveners; United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, Applicant, v. Leader Structures (Ontario) 1980 Limited, Respondent, v. Labourers'

International Union of North America, Local 527, Intervener #1, v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, Intervener #2; United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, Applicant, v. S. R. Lentz Construction Incorporated, Respondent

**Bargaining Unit – Certification – Construction Industry – Practice and Procedure – Carpenters' Union chartering applicant local to represent trades outside carpenters' designation – Whether applicant constituting affiliated bargaining agent represented by designated employee bargaining agency – Not entitled to file certification application under s.144(5) – Board finding applicant precluded by s.146(2) from entering into agreement even if certified**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members H. Kobryn and J. Wilson.

*APPEARANCES:* Douglas J. Wray, T. G. Harkness and J. C. Carruthers for the applicant; Pierre Jauvin appearing for Manacon Construction Limited, D'Angelo Plastering Company Limited and Leader Structures (Ontario) 1980 Limited; Stephen R. Lentz appearing for S. R. Lentz Construction Incorporated; S. B. D. Wahl, T. Connolly and P. Roy appearing for the interveners.

**DECISION OF THE BOARD:** March 17, 1983

1. Pursuant to the findings herein as to the proper name of the applicant, the name of the applicant is amended to read: "United Brotherhood of Carpenters and Joiners of America, General Workers Local No. 1030, Province of Ontario."
2. These are five applications for certification which were listed for hearing together with respect to two issues common to all five applications. The application in Board File No. 0165-82-R has been the subject of two earlier decisions, in the first case by the Board as constituted herein and without a hearing, and in the second case, by the Board differently constituted and after a hearing. The applicant has requested in its applications in Board Files No. 0227-82-R and No. 0258-82-R that pre-hearing representation votes be held. Pursuant to a ruling of the Board in the second decision issued with respect to Board File No. 0165-82-R, the hearing in these applications were held in Ottawa.
3. During two days of hearings separated by some three months, the Board heard the evidence and representations of the parties on the two issues common to the five applications; that is,
  - (a) whether the applicant ("Local 1030") could take into membership persons other than carpenters, joiners and their apprentices and,
  - (b) whether the bargaining units sought by Local 1030 were appropriate under section 144 of the *Labour Relations Act*.



By the end of the first day Local 1030 had completed its evidence in chief and the interveners had started to call their evidence. Three months later when the hearing resumed, counsel for the interveners sought to call evidence to show that seven of the ten persons who purported to be the charter members of the Local 1030 were members of Local 527 at the time when they applied for the charter and continue to be members. That made the charter invalid, counsel contended, because the constitution of the United Brotherhood of Carpenters and Joiners of America ("the United Brotherhood") prohibits its members from retaining membership in trade unions having overlapping or competing jurisdiction with it. Counsel for the Local 1030 objected to the matter being raised at this point in the proceedings and to its relevance. In view of the stage of the proceedings and in the absence of any prior notice of intent to raise the issue, the Board refused to hear the evidence which the interveners were seeking to introduce.

4. The five applications were brought under subsection 5 of section 144 of the Act. The bargaining units described in each application differ from one another in various respects, but they share the common feature that Local 1030 seeks to represent a trade or trades other than the carpenter trade in units which would include the industrial, commercial and institutional (ICI) sector of the construction industry. In all but File No. 0374-82-R, Local 1030 is applying to represent construction labourers, cement finishers, and waterproof applicators in the ICI sector in the Province of Ontario and, except for File No. 0212-82-R, in all other sectors of the construction industry in one or more of the Board's geographic areas #13, #14, #15 and #31. In File No. 0374-82-R, Local 1030 seeks to represent only construction labourers in Board area #15 in a unit described without reference to sector.

5. The issue with respect to the appropriateness of the bargaining units which is common to the five applications revolves around whether Local 1030 is an affiliated bargaining agent within the meaning of clause (a) of section 137(1) of the Act. The interveners claim that it is and, further, that it is captured by the carpenters employee bargaining agency designation. According to the interveners this makes it a trade union which, if it wishes to make an application for certification that relates to the ICI sector, must apply under section 144(1) of the Act; and, if it wishes to make an application which does not relate to that sector, it must apply under section 144(3). Conversely, the interveners maintain that Local 1030 is not a trade union which can bring an application under section 144(5) of the Act. The reason why the interveners wish to confine Local 1030 to section 144(1) when making applications which relate to the ICI sector for bargaining rights for construction labourers, is that Intervener #2 in the Manacon application is the designated employee bargaining agency for a provincial bargaining unit of affiliated bargaining agents who represent construction labourers in the ICI sector. For reasons more fully set out in the argument of the interveners' counsel later in this decision, the interveners hold to the view that there would be no appropriate bargaining unit of construction labourers which Local 1030 could represent that would satisfy section 144(1) of the Act, thus its application should be dismissed. Local 1030, not surprisingly, takes the opposite view that it is not an affiliated bargaining agent and is not represented by a designated employee bargaining agency. As such, it would be a trade union which is eligible to make applications for certification (or enter into voluntary recognition agreements) on its own behalf under section 144(5) of the Act. Local 1030 contends further that bargaining units of all unrepresented trades at work on the dates of making these applications would be appropriate ones under section 144(5)

pursuant to the Board's approach to defining bargaining units in the construction industry.

6. Local 1030 had been certified twice by the Board prior to the making of these applications. In Board file No. 0023-82-R, *Richard D. Steele Construction (1979) Ltd.*, a decision which issued April 29th, 1982, Local 1030 was certified to represent a unit of construction labourers in the Board's geographic area #30, a unit which was described without reference to sector. The unit was described pursuant to section 6(1) of the Act and the only employees at work on the date of the application were construction labourers. In Board file No. 0044-82-R, *Ottawa Door Consultants Ltd.*, an unreported decision which issued May 17th, 1982, Local 1030 was certified for all employees of the respondent in the Regional Municipality of Ottawa-Carleton engaged in the installation, repair and maintenance of doors, excluding, inter alia, carpenters and carpenters' apprentices who were employed by the respondent and already represented by Local 1030's sister Local 93. That unit was determined pursuant to the provisions of section 6(1) of the Act too. Both of these certifications were issued without any hearing. In *Steele Construction, supra*, the Board found on the evidence before it that Local 1030 was a trade union within the meaning of section 1(1)(p) of the Act, but was not an affiliated bargaining agent within the meaning of article (a) of section 137(1). Consequently, the Board found that the application was an application for certification pursuant to section 144(5) of the Act. The Board did not make a specific finding that the applicant was, in the words of clause (f) of section 117, "... a trade union that according to established trade union practice pertains to the construction industry.". It did find, however, that the application had been made pursuant to section 119 of the Act. That section mandates the Board to determine appropriate bargaining units by reference to a geographic area and not to confine the unit to a particular project. In order for the Board to make that finding, it had to be satisfied that the applicant was a trade union which pertains to the construction industry within the meaning of clause (f) of section 117 of the Act.

7. These five applications for certification are the first instances in which the issues have been raised and joined with respect to Local 1030's ability to take into membership persons other than carpenters, joiners and their apprentices and its status to file applications for certification pursuant to section 144(5) of the Act. The interveners contend that Local 1030 is an affiliated bargaining agent within the meaning of the Act and, therefore, is limited to making applications for certification under section 144(1) of the Act if they relate to the ICI sector of the construction industry or under section 144(3) of the Act if they relate to other sectors.

8. The Board heard the evidence of two witnesses on behalf of Local 1030 and one on behalf of the interveners and from their evidence it makes the following findings of fact.

9. The charter was issued March 1st, 1982 by the United Brotherhood to Local Union No. 1030. The charter is signed by William Konyha, General President and by John S. Rogers, General Secretary of the United Brotherhood. The charter was installed at a meeting called for that purpose on March 25th, 1982. The meeting approved the Constitution and Laws of the United Brotherhood. Those present signed applications for membership and voted to adopt the Constitution and Laws of the

United Brotherhood as the Constitution and Laws of Local 1030. The election of officers was also held at that meeting.

10. The charter was issued in response to an application for charter made by ten persons on February 10th, 1982. The text of the application reads as follows:

In accordance with Section 29 of the Constitution and Laws of the United Brotherhood, we enclose herewith a money order of \$50.00 together with our Charter Application. We seek a Charter for a Local Union to be called, 'General Construction Workers, Local \_\_\_\_\_.'

The jurisdiction we seek is 'helpers, including labourers, and other construction workers (excluding carpenters and carpenter apprentices, who are employed in the Industrial, Commercial and Institutional Sector of the Construction Industry)'

We expect that our office will be based in Ottawa and we seek authority to organize and represent workers in the above trade jurisdiction throughout the Province of Ontario.

The application was acknowledged by Konyha in a letter dated February 25th, 1982 addressed to Mr. Thomas Harkness, Director, Canadian Regional Organizing Office, with a copy indicated to Germain Picard which is the same name that appears as the first signature on the application for charter. The text of the letter is set out below:

I am in receipt of a request for charter for a Local Union to be called 'General Workers Union' and in accordance with Section 29 of the Constitution and Laws this request was accompanied by money order in the amount of \$50.00.

The jurisdiction requested is 'helpers', including Labourers, and other construction workers (excluding carpenters and carpenter apprentices, who are employed in the Industrial, Commercial and Institutional Sector of the Construction Industry).'

I am approving of the application for a benefit schedule I local union to be known as *General Workers Local Union No. 1030, Province of Ontario*, to be effective March 1, 1982.

It is my understanding that the office will be based in Ottawa, Ontario and Local Union No. 1030 will organize and represent workers in the above trade jurisdiction throughout the Province of Ontario.

The charter and outfit will be shipped to you for installation.

(emphasis added)



11. The charter issued to Local 1030 is the same as those issued to other local unions of the United Brotherhood, including locals of its Lumber and Sawmill subdivision. The charter empowers Local 1030, *inter alia*, to "... initiate into membership any person or persons, lawfully proposed and elected, in accordance with the Constitution, Rules and Regulations" of the United Brotherhood. It gives Local 1030 the same rights, privileges and benefits as any other Local Union of the United Brotherhood. The charter contains no reference to the trade jurisdiction of the local and no specific reference to its geographic jurisdiction except as is included in the name "Local Union No. 1030, Province of Ontario". The charter makes no reference to the rights, benefits and privileges of the members of Local 1030, but the evidence is that they have the same rights, benefits and privilege of any other "benefit schedule I local union of the United Brotherhood". The constitution of the United Brotherhood to which Local 1030 is required by its charter to conform is fully entitled "Constitution and Laws of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA and Rules for Subordinate Bodies Under Its Jurisdiction". It was this constitution which was adopted by Local 1030 as its own. Hereafter the use of the word "Constitution" will be with reference to the constitution of Local 1030 and the term International Constitution will be used to refer to the constitution of the United Brotherhood. The sections of the Constitution on which the parties rely include: Section 1, Name of Organization, Article A; Section 2, Objects; Section 6, Jurisdiction, Articles A and B; Section 7, Trade Autonomy, Articles A and B; Section 10, General President, Articles A, D, G and K; and under the General Laws, Section 25, Jurisdiction and Powers of Local Unions, Articles A and I; Section 29, Admission of Local Unions, Articles A and B; and Section 42, Qualifications for Membership, Articles A, B and F.

12. In each of these five applications, Local 1030 is seeking to represent, *inter alia*, construction labourers employed by the respondents and it is these persons which the interveners contend Local 1030 lacks the jurisdiction to accept into membership. The persons who were charter members and those who applied for membership in *Steele Construction*, *supra*, were in this category. There is no evidence that their membership applications were approved specifically by General President Konyha. In all applications except Board File No. 0374-82-R, Local 1030 was seeking also to represent cement finishers and waterproof applicators. It is not disputed that the United Brotherhood has a past practice of taking into membership persons other than carpenters, joiners and their apprentices and the evidence before the Board reveals that sister locals of Local 1030 have a practice of accepting into membership persons other than carpenters, joiners and their apprentices. Local 1669 of the United Brotherhood has organized and been certified for construction labourers, together with carpenters and carpenters' apprentices, in many instances by the Board. After the Board's certificate has issued, it has been the local's practice to transfer the bargaining rights with respect to construction labourers to the Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood. This local has a practice of admitting to membership construction labourers and persons other than carpenters and joiners as defined in section 7, Trade Autonomy of the Constitution. Local 2693 is party to a Collective Agreement with the General Contractors' Division of the Construction Association of Thunder Bay Incorporated. The agreement lists 17 member firms of the Association as being bound by the agreement. The wage schedule includes classifications of work such as: truck driver, compressor operator, operators of tractors, cranes,

draglines, back hoes and shovels, welders, mechanics and cement finishers. Local 2693 has accepted persons in these classifications into membership. It has not had these persons refused for membership by the United Brotherhood nor has it received the specific approval of the General Brotherhood, Local Unions No. 446 and No. 2050 have been certified by the Board to represent construction labourers and Local 2050 was certified as well to represent painters and plumbers.

13. The United Brotherhood and its Ontario Provincial Council is the designated employee bargaining agency for carpenters and carpenters' apprentices in the ICI sector of the construction industry. It was designated pursuant to section 139(1) of the Act to represent in collective bargaining in the ICI sector all journeymen and apprentice carpenters, other than millwrights, represented by the following affiliated bargaining agents:

1. United Brotherhood of Carpenters and Joiners of America; or
2. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America; or
  - (1) the Carpenters District Council of Toronto and Vicinity, or the
  - (2) Lake Ontario District Council, or the
  - (3) Western Ontario District Council, or the
  - (4) Ontario Acoustical and Drywall District Council; or
3. the following Local Unions: 18, 27, 38, 93, 249, 397, 446, 494, 562L, 572, 666, 675, 681, 785, 1071, 1133, 1256, 1304, 1316, 1450, 1617, 1669, 1747, 1946, 1963, 1988, 2041, 1050, 2222, 2451, 1466, 1480, 1482, 1486, 2965, 3227 of the United Brotherhood of Carpenters and Joiners of America; or
4. any other Local of the United Brotherhood of Carpenters and Joiners of America which in the future may be chartered to represent Journeymen and Apprentice Carpenters other than Millwrights.

The designation was made by the Minister of Labour April 10th, 1980, nearly two years before Local 1030 received its charter and replaced a prior one which had issued March 3, 1978. The United Brotherhood is also part of the designated employee bargaining agency for millwrights. It issued January 30, 1978 and designates the United Brotherhood and its Millwright District Council of Ontario to represent in collective bargaining in the ICI sector of the construction industry all journeymen and apprentice millwrights represented by the United Brotherhood, the Council or Locals 38, 494, 1410, 1425, 1592, 1669, 1916 or 2309 of the United Brotherhood or any other local of the United Brotherhood that might be chartered to represent millwrights in the ICI sector.

14. With respect to the challenge to Local 1030's jurisdiction to take into membership the persons whom it is seeking to represent in these applications, counsel for the interveners contends that the Constitution does not include "construction labourers" in section 42F of Qualifications for Membership amongst the divisions and sub-divisions of the Trade Autonomy described therein. He submits that the Constitution is quite specific with respect to qualifications for membership beginning with its Objects, Section 2 which include "... to organize workers employed within the trade autonomy of the United Brotherhood, ..."; the description of the division and sub-division of its Trade Autonomy in Section 7 and the incorporation of that description into section 42F of Qualifications for Membership with the mandate that "A candidate to be admitted to membership in any Local Union of the United Brotherhood ... must be ..." in one of the divisions or sub-divisions of the trade autonomy or a helper to one of them. Candidates for membership who are employed in a work classification not included in the trade autonomy may be admitted to membership on approval of the General President. Counsel contends that there is no evidence that the applications for membership in Local 1030 of persons who are not in the trade jurisdiction were approved by the General President. Local 1030's charter does not alter the situation, counsel claims. It is the same charter as is issued to other locals of the United Brotherhood and is not limiting in Local 1030's rights, duties and benefits as compared with other locals. Therefore, Local 1030 has a duty to represent all persons in work classifications included in the trade autonomy of its constitution and has no right to represent persons in other work classifications because such persons have not been approved for membership by General President Konyha. In other words, Local 1030 must represent carpenters, joiners and their apprentices without exception and cannot represent construction labourers unless their applications for membership have been approved by the General President. According to counsel, the February 25th letter from Konyha to Harkness does not provide that approval since it was issued prior to Local 1030 coming into existence March 1st when its charter was issued and, being the later document, the charter must prevail.

15. The mandatory nature of the language of the Constitution in section 42F coupled with the other sections referred to, counsel for the interveners argues, results in the Constitution raising a bar to Local 1030 accepting into membership persons employed in the work classifications specified in the Constitution whose membership applications have not been approved by the General President. As a result of this bar, counsel argues, Local 1030 must demonstrate a practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws so that, pursuant to section 103(4) of the Act, the Board "... need not have regard for such eligibility requirements."

16. Counsel for Local 1030 responds on three grounds to the challenge to the Local's jurisdiction to accept into membership those persons whom it is prepared to accept and to represent and whom it specifically seeks to represent by these applications:

- (a) there is no express provision in the Constitution which would prevent the persons in question from being accepted as members of Local 1030;



- (b) the General President of the United Brotherhood has authorized and issued a charter which would allow Local 1030 to admit to membership these persons; and,
- (c) if the Board finds that there is a bar in the Constitution and that the General President has not authorized Local 1030 to admit them to membership, Local 1030 has a practice of admitting to membership such persons without regard to the eligibility requirement of its Charter or Constitution thus satisfies the requirements of section 103(4) of the Act.

17. Counsel submits that, while section 42F of the Constitution prescribes detailed qualifications for membership it contains no specific prohibition which would exclude from membership persons in the work classification of construction labourers. That fact is substantiated, he contends, by the way responsible officers of the United Brotherhood and some of Local 1030's sister locals have interpreted it by their actions of accepting persons other than carpenters, joiners and apprentices as members and by accepting specifically construction labourers. He points to the acknowledged practice of the United Brotherhood and to the evidence with respect to its Locals 1669 and 2693.

18. With respect to the General President having authorized Local 1030 to accept these persons as members, counsel relies on its express authority in section 42F and the exercise of that authority in Konyha's letter of February 25th, 1982 approving the application for charter. Counsel maintains that section 42F gives the General President the express authority to approve admission to membership of candidates who are employed in a work classification not set out in that section. He maintains further that Konyha explicitly and specifically exercised that authority when he acknowledged in his February 25th letter that the charter applicants had requested a jurisdiction of "... 'helpers, including construction Labourers, and other construction workers ...'" and then approved the application for a charter. This action demonstrates clear approval of the General President for Local 1030 to accept specifically construction labourers and generally other construction workers even though they may be employed in work classifications not listed in section 42F of the International Constitution.

19. Should the Board nonetheless find that the Constitution contains a prohibition which would exclude from membership in Local 1030 the persons at issue herein, counsel argues that the evidence shows conclusively that Local 1030 has accepted into membership persons doing the same kind of work when it accepted as members its charter members and the persons whom it has been certified to represent in *Steele Construction* and *Ottawa Door*, *supra*. Since Local 1030 is a newly chartered Local Union of the United Brotherhood which has been chartered under the existing International Constitution and has adopted it as the Local's own constitution, the Board can take into account how the International Constitution has been interpreted by responsible officers of the United Brotherhood and responsible officers of some of its other Local Unions. Their interpretations of the International Constitution, counsel asserts, is demonstrated by the fact that the United Brotherhood and its Locals 446, 1669, 2050 and 2693 have accepted as members in numerous instances persons

employed as construction labourers and that Local 2693 represents and has as members persons who are in work classifications other than those listed in section 42F of the International Constitution. Counsel argues that an inquiry by the Board into how responsible officers of the United Brotherhood and its other Local Unions have interpreted and applied the membership provisions of the International Constitution is a “persuasive inquiry” with respect to Local 1030’s ability to accept into membership the persons in question.

20. The Board has considered the submissions of the parties on the issue of the jurisdiction of Local 1030 to take into membership persons other than carpenters, joiners and their apprentices and it has reviewed and considered the wording of the sections of the Constitution on which they rely. Having done so the Board finds as follows.

21. Counsel for Local 1030 and for the interveners apply different interpretations to the Constitution but, generally, both have correctly represented the content of the sections on which they rely. The Board is going to assume, without finding, that the mandatory language in section 42F of the Constitution with respect to membership qualifications creates a specific exclusion of persons other than those in work classification spelled out in the section. These work classifications are the same as the divisions and sub-divisions of the trade set out in section 7B of Trade Autonomy. These work classifications include helpers to any of divisions or sub-divisions of the trade, therefore the Board finds that construction labourers who are helpers to carpenters would be included by the work classification “helper to any divisions or sub-divisions of the trade”. Local 1030, however, is not relying on that work classification to cover all construction labourers and admits it does not do so. Thus, on the assumption that there is a specific prohibition against Local 1030 accepting other types of construction labourers and any work classifications not set out in section 42F which might be captured by the term “other construction workers” used in the application for charter and Konyha’s letter approving the application, in order for Local 1030 to accept such persons into membership it would require the approval of the General President.

22. The words at the end of section 42F of the International Constitution and the Constitution which express his authority to admit such persons to membership contain nothing to suggest this requires him to give his approval to each individual application. Nor does it suggest that he cannot grant authority generally to a local union of the United Brotherhood to accept into membership persons who are not in any of the specified divisions or sub-divisions of the trade. Having regard to the evidence before the Board, it finds that the General President vested this authority in Local 1030 when he accepted and approved their application for charter for the requested jurisdiction of “helpers, including Labourers, and other construction workers (excluding carpenters and carpenter apprentices, who are employed in the Industrial, Commercial and Institutional Sector of the Construction Industry).” The Board gives no weight to the fact that the Charter, which followed in time the issuing of the approval letter, does not contain the same reference. The filing of the application, the letter accepting it and approving the issue of the Charter, the issuing and subsequent installation of the Charter are part and parcel of one process of chartering a new local union of the United Brotherhood. When viewed in this context, the Board is satisfied that the General President intended to grant the authority to Local 1030 referred to above and

did do so and the Board so finds. For the same reason, the Board finds also that the General President intended to exclude and did exclude from Local 1030 the authority to accept into membership carpenters and carpenters' apprentices who are employed in the ICI sector of the construction industry; and intended to authorize and did authorize the use of the name General Workers Union, Local 1030, Province of Ontario.

23. The Board finds further that Local 1030 desires to accept into membership and to represent such persons; that the employees whom they seek to represent, by applying for membership in Local 1030, have, *prima facie*, expressed their desire to be members of and be represented by Local 1030 and that the United Brotherhood is prepared to have these persons accepted into membership and to have them represented by Local 1030.

24. For these reasons the Board finds that the proper name of the applicant is the United Brotherhood of Carpenters and Joiners of America, General Workers Union Local Union No. 1030, Province of Ontario and that it has the authority to accept into membership carpenters helpers, construction labourers and other construction workers, excluding carpenters and carpenters' apprentices employed in the ICI sector of the construction industry and confirms its finding that it is a trade union within the meaning of section 1(1)(p) of the Act.

25. The respective positions of the applicant and the interveners with respect to whether Local 1030 is an affiliated bargaining agent and the effect the answer to that question would have on these applications may be summarized as follows. Counsel for the interveners contends that Local 1030 satisfies that definition, is an affiliated bargaining agent and, since it was chartered after the designation of the carpenters employee bargaining agency, is covered by clause 4 (the "basket clause") of that designation (see paragraph 13 above) which reads as follows:

4. any other local of the United Brotherhood of Carpenters and Joiners of America which in the future may be chartered to represent Journeymen and Apprentice Carpenters other than Millwrights.

Therefore, counsel contends, Local 1030 is limited to making applications for certification pursuant to either subsection 1 or subsection 3 of section 144 of the Act and is further limited to bargaining units which are appropriate for applications made thereunder. Counsel takes the position that the applications relate to the ICI sector and must be dealt with under section 144(1). Furthermore, he argues that a unit consisting of any trade other than carpenters would not be appropriate under that section. Therefore, since the applications are not made on behalf of carpenters, there would be no appropriate unit. Local 1030's counsel contends that it is not an affiliated bargaining agent and is entitled to apply under subsection 5 of section 144 and to represent bargaining units which would be appropriate under that subsection. The thrust of Local 1030's position is that units comprised of all unrepresented trades employed on the dates of the applications by the employers in all sectors of the construction industry including the ICI sector (but excluding carpenters in the ICI sector) would be appropriate and in accordance with the Board's approach to describing bargaining units in the construction industry. Both parties rely on the Board's decision in *Clarence H. Graham Construc-*



*tion Limited*, [1981] OLRB Rep. Sept. 1195 as authority for their arguments. The Board agrees that the principles of that decision apply to the facts of this case, but how and to what effect depends, in part, on whether Local 1030 is an affiliated bargaining agent.

26. These applications have been brought under the Construction Industry and Province-Wide Bargaining parts of the Act; respectively sections 117 to 136 and 137 to 151. The sections which bear on the question of whether Local 1030 is an affiliated bargaining agent and what effect that determination would have on its status to bring applications for certification under section 144 are the following:

117. In this section and in sections 118 to 136,

- (f) "trade union" means a trade union that *according to established trade union practice* pertains to the construction industry.

(emphasis added)

137.-(1) In this section and in sections 138 to 151,

- (a) "affiliated bargaining agent" means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency;
- (b) "bargaining", except when used in reference to an affiliated bargaining agent, means province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e);
- (c) "employee bargaining agency" means an organization of affiliated bargaining agents that are subordinate or directly related to the same provincial, national or international trade union, and that may include the parent or related provincial, national or international trade union, formed for purposes that include the representation of affiliated bargaining agents in bargaining and which may be a single provincial, national or international trade union;
- (d) "employer bargaining agency" means an employers' organization or group of employers' organizations formed for purposes that include the representation of employers in bargaining;
- (e) "provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee

bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

(2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining units are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(3) Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

(4) A voluntary recognition agreement in so far as it relates to the industrial, commercial and institutional sector of the construc-

tion industry shall be between an employer on the one hand and either,

- (a) an employee bargaining agency;
- (b) one or more affiliated bargaining agents represented by an employee bargaining agency; or
- (c) a council of trade unions on behalf of one or more affiliated bargaining agents affiliated with the council of trade unions,

on the one other hand, and shall be deemed to be on behalf of all the affiliated bargaining agents of the employee bargaining agency and the defined bargaining unit in the agreement shall include those employees who would be bound by a provincial agreement.

(5) Notwithstanding subsections (1) and (4), a trade union that is not represented by a designated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf.

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

27. How then do these province-wide bargaining provisions affect the status of Local 1030 to bring applications for certification under section 144? The Board noted in paragraph 6 above that the Board in *Steele Construction, supra*, "... had to be satisfied ..." that Local 1030 was a trade union which pertains to the construction industry within the meaning of clause (f) of section 117 of the Act. The Board has consistently interpreted the words of clause (f) to require an applicant trade union to demonstrate that it and/or its parent has an established practice of bargaining for employees in the construction industry. In this respect, the Board commented as follows in its decision in *Ben Bruinsma and Sons Limited*, [1964] OLRB Rep. Feb. 647:

It is clear from the evidence that the applicant trade union "pertains to the construction industry". (See in particular Articles 1 and 111 of its Constitution). The sole question, then, is what



meaning ought to be given the words "... that according to established trade union practice ...". It is our considered view that if it had been the intention of the Legislature that the Board have regard only for the union constitution, there would have been no necessity for including in the definition the last quoted words. If the Legislature had intended the Board to consider only the union constitution then it seems to us the definition would have read, quite simply, "trade union means a trade union that pertains to the construction industry".

Some other meaning, therefore, must be given the words "that according to established trade union practice ...". That practice in our opinion has to be established by ascertaining the collective bargaining history of the union, both local and parent. If the practice as ascertained by an examination of the union's collective agreements is to bargain for workers employed in the construction industry, then the union has satisfied the requirement "according to established trade union practice".

28. When a newly chartered trade union which pertains to the construction industry applies for certification under the construction industry provisions of the Act, it has been the Board's policy to rely on the practice of the trade union's chartering organization in determining whether there is an established practice of bargaining for employees in the construction industry. If the parent organization has a demonstrated practice of representing employees in the construction industry and it has chartered the applicant to represent employees in the construction industry, then the Board accepts that as *prima facie* proof that the applicant satisfies the requirements of clause (f) of section 117. This recognition is of significant benefit to a new trade union because immediately the Board's Rules of Practice for construction industry applications apply to it and so do the construction industry provisions of the Act and the Board's approach to describing bargaining units in the construction industry. Amongst other things, in normal circumstances, this means a new union would be able to get certified without need of a hearing; have its bargaining unit described with reference to a geographic area rather than a municipality and with reference to a trade or trades rather than all employees. Thus, if the new trade union was seeking to represent its normal construction trade, it would need only to organize the employees in that trade, not all employees at work at the time the application was made. By contrast a new trade union which was unable to satisfy section 117(f) would be restricted to applying for certification under section 5 of the Act and its application would be subject to the Rules of Procedure for such applications. Those rules require, amongst other things, that the Board hold a hearing into the application. Nor, for example, would it be able to seek to represent only employees in a single trade if other unrepresented employees were employed at the time of the application because it would be unable to satisfy all three criteria set for craft trade unions in section 6(3) of the Act.

29. Therefore, on the basis of that policy, Local 1030, which by its charter and constitution is a trade union that pertains to the construction industry and being a chartered local of the United Brotherhood which unarguably is a trade union that has an

established practice of representing employees in the construction industry, is a trade union within the meaning of clause (f) of section 117 of the Act.

30. This does not necessarily make it an affiliated bargaining agent, however. The definition of an affiliated bargaining agent in section 137 (1) (a) quoted above at paragraph 26 sets out two requirements:

- (a) "... according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees ..."; and
- (b) "... is subordinate or directly related to, or is, a provincial, national or international trade union, ...".

(emphasis added)

No doubt Local 1030 satisfies the second requirement of the definition, but as a newly chartered trade union there is no evidence before the Board of its own practice from which it can be determined whether it satisfies the first requirement of the definition. Its parent, the United Brotherhood, represents employees in the construction industry (carpenters and millwrights) who commonly bargain separately and apart from the other employees and is itself an affiliated bargaining agent. The use of the phrase "... according to established trade union practice in the construction industry, ..." in the first part of the definition of an affiliated bargaining agent has the same purpose and effect, in the Board's view, as the phrase "... according to established trade union practice ..." used in clause (f) of section 117. That is, it means that a trade union cannot rely simply on its charter and constitution to establish that it represents employees in the construction industry who commonly bargain separately and apart from other employees, it must be able to demonstrate that it and/or its chartering organization has an established practice of doing so. Since the Board is prepared to rely on the established practice of the parent organization with respect to the "established practice" requirement of clause (f) of section 117 of the Act and not require one of its newly chartered locals to develop the practice before it can be found to be a trade union within the meaning of that section and having regard for the benefits of that policy to a new trade union, it seems reasonable for the Board to look also to the established practice of the parent when deciding whether a newly chartered trade union satisfies the first requirement of section 137(1)(a).

31. The United Brotherhood is one of the international building trades unions which were affected by the introduction of Province-wide Bargaining part of the Act. It also has been made the designated employee bargaining agency, together with its provincial councils of carpenters and millwrights, for carpenters and millwrights in the ICI sector who are represented by its affiliated bargaining agents. Clearly, the United Brotherhood satisfies both requirements of section 137(1)(a) and is an affiliated bargaining agent. The Board is satisfied, therefore, that Local 1030, having been chartered to organize and represent construction industry employees, is a trade union that according to established trade union practice represents employees in the construction industry (that is employees in the carpenter or millwright trades) who commonly

bargain separately and apart from other employees. Accordingly, the Board finds that Local 1030 fits within the definition of an affiliated bargaining agency in section 137(1)(a) of the Act and therefore is an affiliated bargaining agent.

32. Does that finding, as counsel for the intervener contends it should, result in Local 1030 being caught by the “basket” clause of the United Brotherhood’s carpenter designation? That designation authorizes the employee bargaining agency “... to represent in collective bargaining *in the ICI sector*) ...” any locals chartered subsequent to its designation by the Minister. Local 1030 cannot represent carpenters and their apprentices in the ICI sector. Therefore it is not caught by the basket clause of the designation. The converse is true with respect to millwrights and their apprentices. The millwrights are the second of the United Brotherhood’s two normal construction trades and there is no restriction in Local 1030’s chartering conditions with respect to that trade. Therefore Local 1030 could represent millwrights without any limitation as to sector. Since Local 1030’s charter does not deprive it of the jurisdiction to represent millwrights in the ICI sector, it would be caught by the basket clause of the designation order pertaining to millwrights and their apprentices. Therefore, Local 1030 is an affiliated bargaining agent represented by the millwrights employee bargaining agency.

33. How does that finding affect these applications? They are applications for certification in the construction industry; they relate to the ICI sector and have been made by an affiliated bargaining agent of an employee bargaining agency. The Board has previously found that section 144 of the Act deals with all possible construction industry applications for certification. See *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195. Therefore, these applications must be processed under that section. Its subsections 1, 3 and 5 each deal with applications for certification. Subsection 5 is reserved for trade unions “... not represented by a designated or certified bargaining agency ...”, so Local 1030 is not eligible to make application under that subsection. Clearly subsection 3 is not available to Local 1030 because it seeks to be certified for the ICI sector and subsection 3 deals with all sectors *other than* the ICI sector. That leaves subsection 1 which deals with all sectors *including* the ICI sector. It mandates that an application which relates to the ICI sector, as these do, be brought by an employee bargaining agency or one or more affiliated bargaining agents of the affiliated bargaining agency. So clearly Local 1030 is eligible to have its applications considered pursuant to subsection 1 of section 144.

34. Section 144(1) also sets certain requirements for the bargaining unit that will be appropriate. It stipulates that:

“... the unit of employees *shall include all employees who would be bound by a provincial agreement* together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.”

(emphasis added)

35. A provincial agreement is, by definition, a collective agreement which, amongst other things, contains provisions respecting “... the rights, privileges or



duties of ... the affiliated bargaining agents represented by the employee bargaining agency, ..." and provisions respecting "... terms or conditions of employment of ... the employees represented by the affiliated bargaining agents and employed in the [ICI] sector ...". Thus a provincial agreement deals with the bargaining rights held by affiliated bargaining agents represented by their employee bargaining agency. In turn, the first requirement of the definition of "affiliated bargaining agent" in section 137(1)(a), as noted at paragraph 30, is that it be a bargaining agent that "... *according to established trade union practice in the construction industry, bargains separately and apart from other employees* ...". From reading those two definitions together, and in the context of the requirement of section 144(1) that "... the unit of employees shall include all employees who would be bound by a provincial agreement ...", it may be seen that those employees represented by the trade union making application under subsection 1 "... who commonly bargain separately and apart from other employees ..." are the ones who would be covered by a provincial agreement. In the case of the applicant herein, being an affiliated bargaining agent of the United Brotherhood, it would be the employees falling within the trade of millwright, or if Local 1030 could represent carpenters employed in the ICI sector, the employees falling within the trade of carpenter; in other words, the two normal construction trades of the United Brotherhood. It is not established practice in the construction industry for labourers, cement finishers or waterproof applicators to be represented by the United Brotherhood or its affiliated bargaining agents in commonly bargaining separately and apart from other employees. Therefore those trades would *not* be covered by the provincial agreement made on behalf of Local 1030 by the millwrights employee bargaining agency, the one designated to represent Local 1030.

36. The established practice in the construction industry is for employees in those trades to be represented by the Labourers International Union of North America or the Operative Plasterers and Cement Masons International Association when bargaining separately and apart from other employees. Accordingly, for purposes of the province-wide bargaining regime, those three trades are subject to two other employee bargaining agency designations and provincial agreements; those of the construction labourers and the operative plasterers. Local 1030 obviously is not an affiliated bargaining agent of either of those employee bargaining agencies. Nor is it a trade union which could be a party to or bound by those two provincial agreements by definition of a provincial agreement. Therefore when employees in those trades are represented by an affiliated bargaining agent that is *not* designated to represent those trades, in this case Local 1030 and the millwrights designated employee bargaining agency, those employees would be outside of the provincial bargaining regime. Since they are outside of that regime and not covered by the millwrights provincial agreement they are not amongst those employees "... who would be bound by a provincial agreement ..." of the millwrights employee bargaining agency. In the result, they would not qualify to be included in the bargaining unit prescribed by section 144(1) of the Act.

37. While the Board has arrived at this result having found that Local 1030 is represented by the millwrights designated employee bargaining agency and, consequently, is a trade union to which subsections 1 through 4 of section 144 apply and is not a trade union to which subsection 5 applies, the Board is of the view that the result would be no different if Local 1030 had been excluded from representing millwrights

and their apprentices in the ICI sector. It would be a trade union that is *not* represented by a designated or certified employee bargaining agency as contemplated by section 144(5), but it would still be an affiliated bargaining agent within the meaning of section 137(1)(a). As an affiliated bargaining agent, it is subject to the strictures of sections 146 of the Act. Subsection 1 of section 146 allows the making of only one Collective Agreement by an employee bargaining agency and an employer bargaining agency for each unit (of affiliated bargaining agents or employers as the case may be) that it represents and that must be the provincial agreement. Subsection 2 makes it an offence for, *inter alia*, an affiliated bargaining agent (without reference to whether represented by an employee bargaining agency and so affecting all affiliated bargaining agents) or employee bargaining agency to bargain for, to attempt to bargain for or to conclude any collective agreement or any other arrangement affecting employees in the ICI sector represented by affiliated bargaining agents *other than a provincial agreement*. Since a provincial agreement must be between an employee bargaining agency and an employer bargaining agency, an affiliated bargaining agent cannot make a provincial agreement unless it is also an employee bargaining agency. With that one exception, an affiliated bargaining agent cannot make a provincial agreement and it is prohibited from making any other agreement or arrangement with respect to employees in the ICI sector. Therefore an affiliated bargaining agent that is not an employee bargaining agency cannot make a lawful agreement with respect to employees in the ICI sector. By comparison, the Christian Labour Association of Canada and the National Council of Canadian Labour, trade unions which are eligible to apply under subsection 5 of section 144 of the Act, are not affiliated bargaining agents. Thus when they are certified to represent employees in the ICI sector, they are not subject to the strictures of section 146(2) of the Act.

38. Were the Board to certify Local 1030 under subsection 5 then, it would not be able to enter into a lawful collective agreement with respect to employees in the ICI sector. Accordingly, a certificate issued to Local 1030 under that subsection with respect to a bargaining unit of employees in the ICI sector would be a nullity because Local 1030 could not conclude a lawful collective agreement for the employees who would be included in the unit and the Board would thus find that such a unit is not appropriate for collective bargaining. The Board faced the same circumstances in its decision in *Diversified Sheet Metal Limited*, [1981] OLRB Rep. Nov. 1575, and having concluded at paragraph 10 that the applicant would not be able to enter into a lawful collective agreement for employees in the ICI sector, expressed its reluctance in paragraph 11 to allow the applicant to make application under subsection 5 of section 144 of the Act.

39. In *Diversified Sheet Metal*, *supra*, the applicant was an affiliated bargaining agent of the designated employee bargaining agency for the sheet metal trade, but was *not* represented by it in bargaining. The applicant was seeking to represent sheet metal workers in the ICI sector and, although the Board was reluctant to entertain its application under subsection 5, it found that it could entertain it under subsection 1 of section 144. Its reasons are given at paragraph 11:

We note, however, that whereas subsection (3) and subsection (5) of section 144 referred to trade unions represented by an employee bargaining agency and trade unions that are not represented by

designated or certified employee bargaining agencies, subsection (1) talks simply of affiliated bargaining agents of the employee bargaining agency. It would therefore appear that the applicant is entitled to bring an application under subsection (1) of section 144.

Pursuant to that reasoning, since Local 1030 is an affiliated bargaining agent and since these applications relate to the ICI sector, they could be treated as having been brought under section 144(1) of the Act. In that event, however, employees classified as labourers, cement finishers and waterproof applicators would not qualify to be included in the bargaining unit prescribed by section 144(1) for the reasons given in paragraph 36 above.

40. Therefore, even were Local 1030 not represented by either the carpenters or the millwrights employee bargaining agency and thus eligible to bring applications under section 144(5), the Board would not certify it as bargaining agent for those employees who, while employed in the ICI sector, were outside of the province-wide bargaining regime.

41. The Board is concerned about another aspect of this application. It appears from the evidence as to the chartering of Local 1030 for the purpose of organizing and representing employees in the construction industry in Ontario, exclusive only of carpenters employed in the ICI sector of the industry, that the United Brotherhood has tried to create Local 1030 as a trade union which would not be a craft trade union pursuant to section 6(3) of the Act and, therefore, would not be restrained by the provisions of that section and would be able to represent construction employees across all trades. In other words, it would be an "all employee" – type of trade union for construction. The limitation in its charter conditions with respect to carpenters employed in the ICI sector, however, creates an impediment to achieving that end. Whenever an all employee-type union that is also a trade union which, pursuant to section 117(f), pertains to the construction industry, applies for certification, the Board's consistent and long-established practice with respect to defining a unit appropriate for collective bargaining is to describe the unit in terms of all unrepresented trades at work at the time the application is made. See *Duron Ontario Limited*, [1967] OLRB Rep. Nov. 734. A practical result of that practice is that the applicant must be able to represent all of the employees in those unrepresented trades. Furthermore, it was the Board's policy prior to the advent of section 144 to describe construction industry bargaining units without reference to sector. In this respect, see *Lyle West Electric Limited*, [1978] OLRB Rep. Nov. 999 and the discussion of this policy in the Report to the Minister of Labour concerning *Bill 204*, an Act to amend the *Labour Relations Act*, submitted on April 11, 1980 by George W. Adams. That policy continues to apply to applications made under section 144(5) of the Act. See *Matterhorn Construction (Hamilton) Limited*, [1981], OLRB Rep. 1276. Section 144(5) is the section under which all employee-type unions would make applications for certification and, of course, the section under which Local 1030 seeks to make these applications.

42. Clearly, if there were unrepresented carpenters at work on the date of an application made by Local 1030, the Board would describe the unit appropriate for collective bargaining so as to include carpenters and carpenters' apprentices. If the carpenters were employed in the ICI sector, Local 1030 would be unable to represent



them thus rendering inappropriate a unit described so as to include carpenters. Conversely, a unit described without reference to carpenters or specifically excluding them, would be contrary to the Board's consistent and long-standing practice and, therefore, would be found to be inappropriate for collective bargaining. Nor would the problem disappear if the unrepresented carpenters were working in a sector other than ICI and if the employer was not bound to the carpenters provincial agreement. The appropriate bargaining unit would be described without reference to sector and so would include the ICI sector. Therefore, if Local 1030 were certified to represent carpenters and the employer later employed carpenters in the ICI sector, they would be employees in the bargaining unit and Local 1030 would be unable to represent them. Thus it would be unable to fulfill its duty under section 68 of the Act.

43. In summary, the Board has found that the United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, has jurisdiction to take into membership persons in the work classifications affected by these applications. For the reasons given above, the Board has further found that employees in the trades of labourers, cement finishers and waterproof applicators when represented by the United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, are employees outside of the province-wide bargaining regime; thus, pursuant to the definition of provincial agreement in clause (e) of section 137(1) of the Act, they are not employees who would be covered by either of the millwrights or carpenters provincial agreements and, therefore, do not qualify as employees in the bargaining unit prescribed by section 144(1) and do not constitute an appropriate bargaining unit under that section. For the reasons set out above, the Board further finds that, had the Board found the United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, eligible to bring these applications under section 144(5) of the Act, the applicant would be unable to enter into a lawful collective agreement with respect to these employees, therefore, there would be no unit which would constitute a unit appropriate for collective bargaining.

44. Accordingly, the Board finds the bargaining units sought in each application is *not* an appropriate unit within the meaning of section 144 of the Act and these applications are dismissed.

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**0745-82-M** United Brotherhood of Carpenters and Joiners of America, Local Union No. 494, Applicant, v. **New Vision Construction Limited**, Respondent

**Construction Industry Grievance – Practice and Procedure – Whether collective agreement requiring payment of travel allowance – Union official assuring employer only workers from local area will be referred avoiding travel allowances – Employer reliance in budgeting for project – Board finding doctrine of estoppel applying against claim for travel allowance**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. Wilson and B. L. Armstrong.

**APPEARANCES:** *Douglas J. Wray and Ian R. Logan for the applicant; David B. Hamilton, John Davison, and others for the respondent.*

**DECISION OF THE BOARD;** March 25, 1983.

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.
2. The applicant trade union and the respondent employer are both bound by the provisions of the current carpenters provincial agreement. The respondent is a construction firm based in the City of Mississauga in the Regional Municipality of Peel. The applicant is a local of the United Brotherhood of Carpenters and Joiners of America with jurisdiction in the Counties of Essex and Kent. The offices of the local are in the City of Windsor in Essex County. The local has approximately 600 members, most of whom reside in Windsor and other nearby communities in Essex County. Approximately 40 members of the local reside in the City of Chatham, which is the largest centre in Kent County.
3. At the time of the filing of the grievance the respondent was engaged in doing the interior work on a Simpsons-Sears store in the downtown area of Chatham. The respondent had what was essentially a "cost plus" arrangement with Simpsons-Sears, although prior to the commencement of the project the respondent was required to provide Simpsons-Sears with details of its labour costs so as to allow it to budget for the work.
4. The general manager of the respondent is Mr. J. Davidson. Prior to commencing a project, it is Mr. Davidson's practice to meet with officials of the various unions that the company will be dealing with. To this end Mr. Davidson met with officials of different unions in both Chatham and Windsor. Mr. Davidson had originally arranged to meet with officials of Local 494 at its offices in Windsor on April 28, 1982. However, because of being delayed in Chatham Mr. Davidson did not arrive in Windsor until the following day. On arriving at the union's offices Mr. Davidson met Mr. Frank Hutnik, Local 494's financial secretary. As financial secretary, Mr. Hutnik's responsibilities primarily involve the internal administration of the local. Labour relations matters on the other hand are generally the responsibility of Mr. Ian Logan, the local's business representative. As is common in the construction

industry, the local's president, Mr. L. Roone, is not a full time official of the local but works "with the tools." Because of this, Mr. Roone is generally not involved in the routine day-to-day affairs of the local. When Mr. Davidson met with Mr. Hutnik to discuss the Simpsons-Sears job, Mr. Hutnik did not advise him that he lacked authority to discuss the project. Rather, Mr. Hutnik and Mr. Davidson engaged in a discussion relating to the availability of carpenters for the project, applicable wage rates and the required employer contributions to various trust funds. During the course of the meeting, Mr. Hutnik handed Mr. Davidson a number of remittance forms on which the respondent could list contributions to the trust funds. Mr. Hutnick also handed Mr. Davidson a sheet setting out in detail the local area wage rates, trust fund contributions and fringe benefits. This sheet had been drawn up jointly by Local 494 and the Windsor Construction Association and was meant to be a summary of the relevant provisions from the carpenters' provincial agreement applicable to Essex and Kent Counties. At the bottom of the sheet was the signature of an official of the Windsor Construction Association as well as the signature of Mr. Hutnik on behalf of Local 494. Mr. Davidson testified that the fact that Mr. Hutnik had signed the sheet on behalf of the local indicated to him that he had considerable authority in the local.

5. During the course of his meeting with Mr. Hutnik on April 30, 1982, Mr. Davidson raised the possibility of having the union refer to the respondent only carpenters who were residents of Chatham. Mr. Davidson had been instructed by Simpsons-Sears to try to hire Chatham men as a public relations gesture. Mr. Davidson also had in mind that the provincial agreement called for employers to pay travel allowances to employees who had to travel. In response to Mr. Davidson's comments, Mr. Hutnik advised Mr. Davidson that the union had unemployed men available in both Windsor and Chatham. There is some dispute concerning what transpired next. Mr. Hutnik testified that while Mr. Davidson may well have said that the respondent preferred Chatham men, and that he in turn had indicated to Mr. Davidson that there were unemployed union members in Chatham, he was certain that he had not gone further and actually promised Mr. Davidson that Chatham men would be referred to the project. For his part, Mr. Davidson testified that he was very concerned that the respondent be able to employ Chatham men, and he specifically recalled that he asked if the respondent could hire Chatham carpenters, to which Mr. Hutnik replied that it should be "no problem." Mr. Davidson's testimony on this point was supported by that of Mr. Peter Yourkevich, an official of Simpsons-Sears. Mr. Yourkevich was in Windsor to deal with certain other matters relating to the Chatham project. However, since he was travelling with Mr. Davidson, Mr. Yourkevich sat in on (but did not participate in) the meeting with Mr. Hutnik. In balancing the evidence of the three witnesses, and considering that Mr. Davidson would have had reason to take particular note of, and recall, Mr. Hutnik's comments on point, we accept that Mr. Davidson did ask if the respondent could obtain Chatham men, to which Mr. Hutnik replied that it should not be a problem. The issue of travel allowances was not specifically discussed at the meeting. Mr. Davidson testified that he felt that there was no need to discuss travel allowances since it was understood that Chatham men would be referred to the job.

6. Mr. Hutnik prepared notes of his meeting with Mr. Davidson and gave the notes to Mr. Logan. (Prior to the hearing Mr. Logan's brief case containing the notes and certain other documents were stolen, and accordingly, the notes were not filed in



evidence.) It is not at all clear how detailed Mr. Hutnik's notes were, or whether they contained any reference to the discussion relating to the referral of Chatham men. However, it appears that Mr. Logan was made aware through the notes or otherwise of the outline of what was discussed between Mr. Davidson and Mr. Hutnik. In cross-examination Mr. Logan was asked why he had not asked Mr. Hutnik specifically what it was that he and Mr. Davidson had agreed to. Mr. Logan's response was "Because I think we'd (i.e. Mr. Logan and Mr. Hutnik would) end up in a fight." Mr. Logan did not immediately contact Mr. Davidson to advise him that the respondent could not rely on Mr. Hutnik's statements.

7. Subsequent to the meeting between Mr. Hutnik and Mr. Davidson, Mr. Davidson calculated the hourly cost for carpenters on the project. His calculations did not contain any provision for travel allowances. Mr. Davidson supplied his calculations to Simpsons-Sears, which in turn used them in calculating its own budget for the project.

8. The respondent employed all of its carpenters by way of referrals from Local 494. The first carpenters arrived on the project on or about May 18, 1982. Eventually a total of 19 carpenters were referred to the respondent. Of these 18 men, nine were from Windsor and three were from the nearby town of Tecumseh. In addition, there were three carpenters from Leamington, and one each from Amherstburg and Kingsville. These are all towns in Essex County. No Chatham carpenters were referred to the respondent, although one carpenter from Thamesville, which is situated in Kent County, was referred. One carpenter normally resident in Ottawa was also referred to the job.

9. Mr. Logan testified that the carpenters who were referred to the respondent were chosen because they were at the top of the local's "out-of-work" list. Mr. Logan further indicated that it is the local's invariable practice to refer men from the top of the list (subject to their being able to do the work involved) regardless of their place of residence. Mr. Logan's testimony on this point was contradicted by two witnesses. Mr. Jim Petsche, the superintendent of Cooper Construction, which was the general contractor on the Simpsons-Sears store, testified that he had personally requested of Mr. Logan that the local refer only Chatham area men to his company. Some thirteen carpenters were employed by Cooper Construction on the project, all of whom resided in Kent County. Three of these carpenters resided in Tilbury, one in Wheatley and the remainder in Chatham. (Given the wording of the relevant portions of the provincial agreement it would appear that no travel allowances would be payable to employees residing anywhere in Kent County when working on a job in Chatham.) It was Mr. Logan's testimony that it was pure chance that only Kent County residents were referred to Cooper Construction. We find this explanation extremely unlikely given that the heavy preponderance of Local 494's members reside in Windsor and other Essex County communities. In these circumstances, we prefer Mr. Petsche's testimony, and accept that with respect to Cooper Construction the local did make a point of referring only Kent County tradesmen. We also accept the testimony of Mr. Patrick Daly, the owner of P. J. Daly, a firm which did some drywall work on the Simpsons-Sears project, that prior to bidding for the work he received an assurance from Mr. Logan that the local would supply Chatham area carpenters to his firm, and that if for some reason it could not supply Chatham men it would supply men from Windsor to whom

the company would not have to pay travel allowances. As it turned out the Daly firm was awarded less work than it had hoped for on the project, and consequently employed only three members of Local 494. At least one (and perhaps all) of these carpenters were from the Windsor area. At one point Mr. Logan asked Mr. Daly to pay the carpenters a travel allowance, but Mr. Daly flatly refused to do so.

10. On or shortly after the day that the respondent first employed carpenters on the Simpsons-Sears project, Mr. Logan came to the job site and had a discussion with Mr. Davidson. Mr. Logan testified that the terms of employment of the carpenters were briefly discussed, and that during the discussion Mr. Davidson stated that he had met with Frank Hutnik and "it was all settled." According to Mr. Logan he did not ask what had been settled, but he did state that he was the business representative of the local and that Mr. Davidson had no right to be dealing with Mr. Hutnik. It appears that no direct reference was actually made to travel allowances during this discussion.

11. The carpenters on the Simpsons-Sears project received their first pay cheques from the respondent on May 27, 1982. On the same day certain of the carpenters complained to Mr. Roone, the president of the local, that they had not received any travel allowance. Mr. Roone then went to the job site and told Mr. Davidson that the company should be paying travel allowances. It appears that during the course of this discussion Mr. Roone used both the terms "travel time" and "travel allowance." In consequence of this, Mr. Davidson reached the conclusion that Mr. Roone was seeking both the payment of travel allowances as well as payments for the time that the carpenters actually spent travelling. It is clear, however, that Mr. Roone meant only to refer to travel allowances. Mr. Davidson's response to Mr. Roone was that he had been advised by Mr. Hutnik that the respondent would be supplied with Chatham men. Mr. Roone indicated that he was aware of Mr. Davidson's discussion with Mr. Hutnik but stressed that the Essex County men had been at the top of the list.

12. On July 2, 1982 the union filed the grievance which is the subject matter of these proceedings. The grievance alleges a violation of schedule "D" of the provincial agreement. The portion of the schedule alleged to have been violated reads as follows:

*"Transportation and Transfer*

For the purpose of determining the employer's obligation to supply transportation to employees, the area is divided into Zones.

*(a) Essex County – Employees providing transportation*

There shall be a free zone within a ten (10) mile radius of the Windsor City Hall. No travel allowances shall be paid to the employees working in this area.

20 Mile Limit – When an employee is required to work in an area outside of the above free zone up to a distance of twenty (20) miles in any direction, he shall be paid a travelling allowance of five dollars and forty cents (\$5.40) a day, five dollars and sixty-five cents (\$5.65) May 1, 1983.

Outside 20 mile Limit – When an employee is required to work in an area outside of the above free zone and the twenty (20) mile area, to the boundaries of Essex County, he shall be paid a travelling allowance of Ten dollars and twenty-five cents (\$10.25) a day, Ten dollars and seventy five cents (\$10.75) May 1, 1983.

*Travel from Essex County to Kent County – If an employee is required to travel from any place in Essex County outside the free zone to Kent County, he shall be paid a travelling allowance of thirty-one cents (31¢) per mile, and thirty-four cents (34¢) May 1, 1983, to the jobsite and return. All of the above miles shall be paid for by the most direct route.*

(b) *Kent County – Employees providing Transportation*

*There shall be a free zone within a five (5) mile radius of the Chatham City Hall. No travel allowances shall be paid to the employees working in this area.*

Outside 5 Mile Limit – When an employee is required to work in an area outside of the above free zone anywhere within the boundary of Kent County he shall be paid a travelling allowance of five dollars and forty cents (\$5.40) a day, five dollars and sixty-five cents (\$5.65) May 1, 1983.

Travel from Kent County to another County – If an employee is required to travel from any place in Kent County outside the free zone to another County he shall be paid a travelling allowance of thirty one cents (31¢) per mile, and thirty-four cents May 1, 1983 to the jobsite and return. All of the above miles shall be measured by the most direct automobile route.”

(emphasis added)

13. The Simpsons-Sears store is located within a five mile radius of the Chatham City Hall, and hence falls within the Chatham “free zone.” It was the contention of counsel for the respondent that since the project was in the Chatham free zone, even on the straight wording of the agreement there was not any requirement on the respondent to pay travel allowances to employees from Essex County. We cannot accept this contention. The purpose of a travel allowance is to compensate employees for travelling. Common sense, as well as the specific reference in the provincial agreement to a travel allowance payable to Essex County employees who travel to Kent County, suggests that the Chatham “free zone” is applicable only to employees who reside in Kent County. Accordingly, employees who travel from Windsor and other communities in Essex County to Chatham would generally be entitled to receive a travel allowance.

14. As an alternative argument, the respondent contends that the trade union is estopped from claiming travel allowances for its employees on the basis of Mr. Hutnik’s



comments indicating that the respondent would be referred carpenters who reside in Chatham.

15. The classic description of the doctrine of estoppel is to be found in *Combe v. Combe* 1951 I ALL.E. R. 767 where Denning L. J. stated (at p. 770):

“The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.”

16. In our view, the doctrine of estoppel is applicable to the facts of this case. Mr. Hutnik indicated that tradesmen from Chatham would be referred to the respondent. Mr. Hutnik held himself out as being able to speak on behalf of the union, and it was reasonable in the circumstances for the respondent to conclude that Mr. Hutnik had the authority to do so. The respondent relied on Mr. Hutnik's comments and prepared its costing figures without any provision for the payment of a travel allowance. Had the respondent been advised that travel allowances would have to be paid, the respondent's costing would have been different. Also, the respondent might have proceeded with the project in a different manner. It was Mr. Davidson's testimony that had he known the union would be seeking the payment of travel allowances, the respondent would have considered either sub-contracting out its carpentry work to another firm, or perhaps paying the employees a board allowance instead of a regular travel allowance, as is permitted under the provincial agreement. Potentially, the respondent might also have challenged the right of the union to refer Essex County tradesmen to a job in Chatham when there were unemployed tradesmen in Kent County. All of these are matters that the respondent did not consider due to Mr. Hutnik's statement there would be “no problem” in supplying Chatham men to the project. In all these circumstances, we are satisfied that the applicant is now estopped from referring Essex County tradesmen to the respondent to work on the Simpsons-Sears project and then claiming travel allowances on their behalf.

17. Having regard to the above, the grievance is hereby dismissed.

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**1588-82-R Ontario Public Service Employees Union, Applicant, v. Ottawa General Hospital, Respondent.**

**Bargaining Unit – Reconsideration – Board decision “mirroring” part-time unit with existing narrow full-time unit – Board not finding grounds for reconsideration**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and Stewart Cooke.

**DECISION OF THE BOARD;** March 22, 1983

1. This is an application for certification in which the applicant has requested the Board to reconsider its decision of December 17, 1982. In that decision, now reported at [1982] OLRB Rep. Dec. 1867, the Board certified the applicant as bargaining agent for:

All medical laboratory technologists of the respondent at Ottawa regularly employed for not more than twenty-four (24) hours per week and students employed as medical technologists during the school vacation period, save and except laboratory scientists, clerical staff and persons covered by subsisting collective agreements,

which was the unit proposed by the respondent employer as appropriate. The applicant relied upon the *Stratford General Hospital* case, [1976] OLRB Rep. Sept. 459, in asking the Board to describe its unit more broadly in terms of all part-time “paramedical” employees of the respondent. This would have the effect of including part-time “professional” paramedics in the unit as well.

2. The applicant, when it filed the instant application, already had a history of collective bargaining at this Hospital for all of the full-time and part-time employees making up what is frequently described as the “technical” group of paramedical employees, with the exception of the part-time medical laboratory technologists described above. In 1973 the applicant was granted a certificate for the full-time medical laboratory technologists, in 1975 a certificate for both the full and part-time employees of the EEG unit, and in 1978 was voluntarily recognized as bargaining agent for both the full and part-time nuclear medicine staff. More recently the applicant and respondent have chosen to consolidate these three bargaining units under a single collective agreement for these “technical” paramedical employees. As this history demonstrates, the applicant had never before found it appropriate to include “professional” paramedical staff in its bargaining with the Hospital, and indeed, it is not obvious that the applicant would have been in a position to obtain the bargaining rights it has already acquired had it not been able, in the days before *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, to do so as it did on a piecemeal basis. Even with the present application the applicant filed membership evidence on behalf of no one other than part-time medical laboratory technologists. However, the applicant was in a position, on the basis of its level of support within the medical laboratory technologists, to sweep the part-time “professional” paramedics into its unit as well, and requested the Board, on the basis of *Stratford General*, *supra*, to do so. In the circumstances, the Board found no basis to depart from what it would otherwise have found to be the appropriate unit (being one which “mirrored” the full-time bargaining

structure developed at this particular Hospital *before Stratford General* was decided) and denied the applicant's request. The applicant now asks the Board to reconsider its initial decision on the grounds:

- (a) The Board improperly fettered its discretion by considering the lack of membership evidence from the professional portion of the proposed bargaining unit in determining the appropriate bargaining unit;
- (b) The Board also fettered its discretion by giving undue emphasis to the Board's alleged policy of mirroring the unit and thereby prevented the recognition of what would otherwise have been the appropriate unit.

3. Dealing with the second point first, the applicant's position rests upon its assertion that the Board's concern for "mirroring" prevented the recognition of "what would otherwise have been the appropriate unit" (i.e. one described along the lines set out in *Stratford General Hospital*). But as the Board pointed out in its original decision, as it did in *Sudbury Memorial Hospital*, [1982] OLRB Rep. Nov. 1722, the *Stratford General Hospital* case did not attempt to address the situation of an *existing* bargaining history and structure which had developed prior to that case being decided, and which on a balancing of factors by the Board, may well override the impact of normal community of interest criteria (as well as concerns over "fragmentation") in fashioning an appropriate bargaining unit. As the Board concluded in *Sudbury Memorial Hospital*, at paragraph 8:

... To try at this point in these circumstances to create the world of bargaining as established in *Stratford General* would unnecessarily disturb a prior existing successful regime of collective bargaining.

4. The Board in *Sudbury Memorial Hospital* found it appropriate instead to follow its normal practice of "mirroring" full-time and part-time bargaining units. This is a practice well known in the labour community, and has the benefit of avoiding the potential for collective bargaining anomalies which may be both foreseen and unforeseen at the time of a particular application. In the instant case, for example, the parties had always excluded the full-time "professional" paramedics from their collective bargaining, and by that action had left that group vulnerable to being organized into a bargaining unit configuration which allied them with a group *other* than "technical" paramedical employees, e.g. the office and clerical group, as happened in *Sudbury Memorial Hospital*, *supra*. This could produce markedly different bargaining goals, conditions of employment, and possibly direct conflicts, as between part-time and full-time employees of the same classification. Similar disparities in interest could even arise if the full-time professionals were organized on their own, as all full-time "technical" personnel are already organized, and could not form part of any certification for full-time "professionals." The potential for conflicting (or at least non-parallel) alliances within the same classification is, because of the degree of organizing already in place, a real one, and must be considered even if one assumes that the same trade union will come to represent all units. Rather than enhance the potential for such collective bargaining anomalies, the Board found it appropriate in the circumstances to



fashion the description of the applicant's new unit in a manner consistent with the existing "technical" paramedical bargaining structure, which the applicant itself had been active in creating. This conclusion to "mirror" was reached, as the Board in somewhat colloquial terms indicated in its decision, only after a careful consideration of the applicant's argument and the comparison made with the *Sudbury Memorial* case, and in the absence of compelling circumstances to the contrary.

5. In this latter regard, the applicant at the hearing made reference to the Board's stated policy of facilitating collective bargaining, and in particular put the issue as it saw it in the following way:

"The question for the Board is how to get the 'professionals' into collective bargaining. This is the most effective way to start."

That, as the Board adverted to at the hearing, is a question which better awaits consideration in a case where the group in question has demonstrated a more overt interest in the process of collective bargaining being promoted by the applicant. The Board's principle of facilitating collective bargaining, as articulated in cases such as *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, is inappropriately invoked by the applicant in a case like the present.

6. The request for reconsideration is denied.

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**2367-81-M** William Wesley Moreland, Applicant, v. United Rubber, Cork, Linoleum and Plastic Workers of America, Respondent Trade Union, v. **Precision Rubber Products (Canada) Limited**, Respondent Employer

**Reconsideration – Religious Exemption – Prior decision holding union security clause not applicable to applicant – Board clarifying that exemption effective from date of application – Directing union to remit dues received between application date and decision date to charity**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members J. A. Ronson and S. Cooke.

**DECISION OF THE BOARD;** March 7, 1983

1. By a decision dated May 31, 1982, (Reported at [1982] OLRB Rep. May 749) a majority of the Board ordered as follows:

"6.(a) Article 5.04 and 5.05 of the collective agreement between Precision Rubber Products (Canada) Ltd. and Local Union #822, United Rubber, Cork, Linoleum and Plastic Workers of America entered into on the 2nd of February, 1982 does not apply to Mr. William Wesley Moreland, and that,

- (b) Mr. William Wesley Moreland is not required to pay any dues to the union provided that amounts equal to any dues or other assessments are paid by the applicant, Mr. Moreland, to a charitable organization mutually agreed upon by the applicant and the respondent trade union. However, if the applicant and the respondent trade union fail to so agree then the parties should inform the Board in writing forthwith, including such representations, if any, that each may care to make as to the charitable organization to be designated and the Board will then designate a charitable organization pursuant to section 47(1) of the *Labour Relations Act*."

2. Subsequently, the Board received a letter from the applicant which read as follows:

"December 1982  
W. Wesley Moreland  
#2 1936  
Winnipeg Street  
Regina, Sask.  
S4P 1G4

Onatrio (sic) Relations Board  
400 University Avenue  
Toronto, Ontario  
M7A 1V4

Dear Sirs;

It is with some frustration and disappointment that I write this letter to you. It is in regards to the casw (sic) which I presented to you earlier this year. The file number is 2367-81-M. I applied for exemption of paying dues as well as belonging (sic) to the 'United Rubber, Cork, Linoleum and Plastic Workers of America', which is the present union at Precision Rubber in Orillia. Because of the time at which I applied, as well as not knowing the length of time taken for the Boards proceedings. I made no mention of retroactive granting of exemption for the paying of my dues to the union. At the tome (sic) in which I first applied, the dues were not being deducted frpm (sic) my earnings and therefore presumed all was well. After the hearing with the board (sic) and the decision not coming, until, I believe at the earliest eight weeks after the hearing, I discovered that the Union would not have to return the monies being taken from my pay, which by this time was being deducted. I felt that this information must have been incorrect so I called your offices, although I was not permitted to speak with one of the men from the hearing. The information was confirmed, that once the dues were deducted and given to the union, the Board had not power to see that these monies would be includes (sic) as monies to be given to the chosen charitable organization. The people with

whom I spoke, were noth (sic) females. I presumed one referred me to the other after some discussion. I asked her how one might change this situation and she said that this was under provincial laws and changes would have to be brought about by legislation. I therefore notified both the M.P.P. for Simcoe East, as well as the Honourable Minister of Labour, expressing my concerns about the situation. I received letters from both, I shakl (sic) referr (sic) especially to the letter from Mr. Ramsay. It seems that I should have firstly requested this at the hearing, but being as my request was made before the mandatory deductions, I saw no present need. I believed that if the Board granted exemption it would be effective from the time I had first written to the Board for the exemption. I am no longer residing in Ontario and am no longer employed by Precision Rubber but I do believe that I was unfairly dealt with as things now stand. I have a reciept (sic) from the hospital fund for \$11.10 and a \$44.40 reciept (sic) from the Union at Precision Rubber. I would prefer to have another reciept (sic) from the hospital for \$44.40 in exchange for the one I have from the union. I believe that I represented my position to you to the best of my abilities, given the information I had in regards to the hearing. I presently have two concerns, one being whether or not you have the power to have the monies paid to the Union instead of given to the hospital fund which was agreed upon. The second concern is, why there is not a provision for an individual who is applying for exemption to have his monies set aside at the time in which he first applied rather than permitting funds to continue to fill the union coffers when the decisions have been made. In respect to that, how would one go about having such a provision made? Is this procedure sought through provincial parliament or is it not?

I enclose (sic) copies of letters sent to and recieved (sic) from Mr. Ramsay. I would like to have some clear and definite information on these matters.

Sincerely yours with respect,

(signature)

W. Wesley Moreland"

Enclosed with that letter was one letter which was dated September 14, 1982 to the Honourable Russell Ramsay, Minister of Labour. However, it is not necessary to reproduce the text of that letter in this decision.

3. We will deal with the request in this letter by Mr. Moreland as a request for a reconsideration, in effect asking the Board to vary or amend its decision of May 31, 1982 in this matter. Simply put, we interpret it as a request for the Board to amend the order of May 31, 1982 cited above to make it a specific date from the date of the making of the present application, which was February 16, 1982.



4. Copies of the above correspondence were sent to both the respondent trade union and the respondent employer. They have responded in writing as follows:

"I would like to acknowledge receipt of your letter of January 11, 1983.

Please be advised that it is the position of the Union that it has fulfilled all of its legal obligations and has met all of the requirements as laid out by the Ontario Labour Relations Board in its various decisions relating to the above matter. Accordingly, it is our position that there is no reason in law for the status quo to be disturbed.

Yours very truly,

MACLEAN, CHERCOVER

Per: (signature)

Stephen Krashinsky"

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"This is in response to Mr. Moreland's letter of December 1982.

There is nothing in the Board's decision of August 12th, 1982, which restricts the retroactive application of that decision.

It would appear to be consistent with the spirit of that decision and the Union's subsequent agreement on a suitable charity to have the modest some (sic) in question paid to the charity without further litigation.

Yours very truly,

(signature)

William G. Phelps."

5. Section 47(1) of the Act reads as follows:

"Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board."

A careful reading of subsection 1 of section 47 does not indicate any limits on the scope of the order which the Board may make in terms of the point in time of its commencement. It would seem, however, that for instance, in a situation where an employee had refused to join a trade union for religious beliefs, and where a union sought the employee's dismissal pursuant to a union security provision of the type outlined under section 46(1)(a) that the Board could under section 47 of the Act, make an order that the clause does not apply and that this order would effectively protect the employee from the dismissal sought by the trade union. It would seem in this sense then that the Board's power would extend to making orders which speak to a time prior than the date on which the Board's order issues.

6. In the present case both the respondent employer and the respondent trade union were notified of this application once it was made. It is clear, therefore, that from the time they received notice of the application, they were in the position of being confronted with the kind of order which the Board ultimately made in its decision of May 31, 1982. That is, from the time of the making of this application, both the employer and the trade union knew the extent of any possible liability which may have occurred if the order were dated from the date of the making of the application. It would seem, therefore, that the request made by the applicant is not so much a matter of retroactive application of the decision of May 31, 1982, as characterized in the letter from the respondent employer, but of simply clarifying the order of that date, that it applied from the date of the making of the application. Further, such an amendment cannot be said to either surprise or prejudice either the respondent employer or the respondent trade union since they knew from the date of the making of the application that Mr. Moreland was seeking an order of the kind ultimately issued in the Board's decision of May 31, 1982. Accordingly, we are prepared to amend the decision of May 31, 1982 to make it clear that from February 16, 1982 onward:

"(a) Article 5.04 and 5.05 of the collective agreement between Precision Rubber Products (Canada) Ltd. and Local Union #822, United Rubber, Cork, Linoleum and Plastic Workers of America entered into on the 2nd of February, 1982 does not apply to Mr. William Wesley Moreland, and that,

(b) Mr. William Wesley Moreland is not required to pay any dues to the union provided that amounts equal to any dues or other

assessments are paid by the applicant, Mr. Moreland, to a charitable organization mutually agreed upon by the applicant and the respondent trade union. However, if the applicant and the respondent trade union fail to so agree then the parties should inform the Board in writing forthwith, including such representations, if any, that each may care to make as to the charitable organization to be designated and the Board will then designate a charitable organization pursuant to section 47(1) of the *Labour Relations Act*."

7. It appears from the correspondence by Mr. Moreland that for some period after the making of the application and prior to the Board's order of May 31, 1982 the union did receive some \$44.40 in membership dues on behalf of Mr. Moreland. We further order that the respondent trade union, in order to comply with the Board's order of May 31, 1982, as amended by paragraph 6 above, pay that amount on Mr. Moreland's behalf to Soldiers Memorial Hospital Building Fund, that being the fund agreed to by the parties.

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**1675-82-R** London & District Service Workers' Union, Local 220, AFL, CIO, CLC, Applicant, v. **Price Waterhouse Limited** and The Maritime Life Assurance Company, Respondents

**Practice and Procedure – Sale of a Business – Court order appointing receiver and manager prohibiting actions or other proceedings with respect to subject property without leave of Court – Application for declaration of sale held not requiring leave of court**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members B. L. Armstrong and E. J. Brady.

**APPEARANCES:** *David Starkman, Paul Middleton and Bernie Hanson for the applicant; R. Budd and B. Grossman for Price Waterhouse Limited; Philip Spencer, Q.C. for The Maritime Life Assurance Company.*

**DECISION OF THE BOARD;** March 4, 1983

1. The applicant has applied to the Board under section 63 of the *Labour Relations Act* with respect to its bargaining rights. The applicant has alleged that on or about February 16, 1982, there was a sale of a business by Chateau Gardens (Hanover) Inc. ("Chateau") to Price Waterhouse Limited ("Price") and The Maritime Life Assurance Company ("Maritime"). It was the position of the applicant that as a result of this alleged sale the respondents are bound by a collective agreement entered into by the applicant and Chateau.

2. In a letter dated December 23, 1982, the applicant informed the Board that it wished to make representations as to the application of section 1(4) of the Act.



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4. Price adopted the position that the applicant is not entitled to bring this application before the Board because it did not apply for and obtain leave of the Supreme Court of Ontario upon notice to Price of its intention to make this application and has not applied to the Court pursuant to paragraph six of the order of The Honourable Mr. Justice Anderson made on February 16, 1982. Price also adopted the position that the Board is without jurisdiction to enforce the obligations of Chateau under the terms of the collective agreement. Price also denied that (i) it had entered into a sale within the meaning of section 63 in respect of 101 – 10th Street, Hanover; or that (ii) the business of Chateau was sold, transferred, leased or in any other manner disposed of by Chateau to Price.

5. Maritime denied that (i) it has entered into any sale with respect to any assets, business or undertaking of Chateau or that (ii) the business of Chateau was sold, transferred, leased or in any other manner disposed of by Chateau to Maritime. It was the position of Maritime that it has never been in possession or control of Chateau or any of its business, assets or undertaking. Maritime also adopted the position that it has never managed, directed, operated or otherwise had any relationship with Chateau or any of its business, assets or undertaking, other than as a secured creditor under a debenture dated May 24, 1979. Maritime further adopted the position that it has never been either an agent or a principal for Chateau and denied that it has ever had any other interest in Chateau or any of its business, assets or undertaking. In disputing the jurisdiction of the Board to enforce the obligation of Chateau or its successors, assigns, administrators or receivers, under the terms of the collective agreement, as against Maritime; Maritime stated that Price had never been its agent.

6. It was agreed by the parties that the Board should initially determine whether it has jurisdiction to entertain this application. In a decision dated February 2, 1983, the Board stated that, for reasons to be given in writing, it had jurisdiction to hear this application. The reasons for the decision dated February 2, 1983, are now set forth.

7. The facts which form the basis of this application are not in dispute. On May 24, 1979, Chateau was operating a nursing home in Hanover, and on that date it executed a debenture in favour of Maritime. On December 1, 1980, the applicant was certified by the Board to represent full-time employees of Chateau at Hanover. On December 8, 1980, the applicant gave notice to bargain to Chateau and bargaining between the applicant and Chateau continued during 1981. In August of 1981, the matter of a collective agreement was referred to arbitration under the *Hospital Labour Disputes Arbitration Act*. On February 12, 1982, Price was appointed receiver and manager of Chateau by Maritime pursuant to the debenture. On February 16, 1982, pursuant to an application by Maritime; the Supreme Court of Ontario, by the order of Anderson, J., appointed Price the receiver and manager of Chateau.

8. Shortly after its appointment, Price assumed total control of the operations of Chateau. Price informed the employees that operations would continue and that Price would be responsible for the payment of their wages. On April 20, and 21, 1982, the board of arbitration established pursuant to the *Hospital Labour Disputes Arbitration Act* rendered its decision on July 19, 1982. On October 8, 1982, the applicant was

certified by the Board for part-time employees of Chateau. The collective agreement which was settled by arbitration expired on December 1, 1982, and the applicant gave notice to bargain on November 18, 1982, with respect of the full-time employees for a new collective agreement. On October 12, 1982, the applicant gave notice to bargain with respect to the part-time employees.

9. Paragraph 6 of the order of Anderson, J., dated February 16, 1982, states:

AND THIS COURT DOTH FURTHER ORDER that no person, firm or corporation shall levy or continue any distress, take or continue any action at law or other proceeding against Chateau Gardens (Hanover) Inc. and Chateau Gardens (Hanover II) Inc. in relation to the subject property, except this action, or the receiver and manager whether for the collection of a debt or the cancellation or termination of any agreement to which Chateau Gardens (Hanover) Inc. and Chateau Gardens (Hanover II) Inc. is a party without leave of this court first being obtained upon application made on seven clear days' notice to the receiver and manager and that no person, firm or corporation shall otherwise interfere with the carrying on of the business of Chateau Gardens (Hanover) Inc. and Chateau Gardens (Hanover II) Inc. in relation to the subject property by the receiver and manager.

10. This proceeding before the Board is an application under section 63 of the Act for a declaration that one or both of the respondents is or are successor employers and bound by the terms of the collective agreement entered into by Chateau. In our view, a proceeding under section 63 is not an "action at law or other proceeding ... in relation to the subject property ... whether for the collection of a debt or the cancellation or termination of any agreement". The present action is declaratory in nature and, if granted, will set forth the nature of the relationship between the parties to this proceeding. This proceeding in itself is neither an action in debt nor a cancellation or termination of any agreement. On this interpretation, paragraph 6 of the order of Anderson, J., dated February 16, 1982, has no application. However, the Board may be wrong in this interpretation. It may be argued that the issuance of a declaration under section 63 is merely the first step in a further proceeding for the recovery of a debt or monies under a collective agreement and that the instant and subsequent proceedings may be considered as essentially one proceeding. The Board therefore proposes to examine the arguments of the parties having regard to these additional considerations.

11. The respondent relied heavily on the case of *International Woodworkers of America, Local 1324 v. Wescanna Inn Ltd. and The Clarkson Company Limited* [1978] 1 W.W.R. 679 in the Manitoba Court of Appeal which reversed a decision of Wright J., in Court of Queen's Bench. In that case, The Clarkson Company Limited had been appointed receiver and manager of Wescanna Inn Ltd. The order appointing The Clarkson Company Limited stated that "And This Court Doth Further Order that no action at law or other proceeding shall be taken or continued against the Defendant or the said Receiver and Manager without leave of this Court first being obtained." The International Woodworkers of America, Local 1-324, applied to the Manitoba Labour

Board to be certified as the bargaining agent for the employees working at the Wescanna Inn. The Manitoba Labour Board suggested that it would be appropriate to seek leave of the Court of Queen's Bench before proceeding with the merits.

12. It was held by Wright, J., that leave was not necessary since an application for certification was not an "action at law or other proceeding taken or continued against the defendant (Wescanna Inn Ltd.) or the receiver, Clarkson." At page 683, O'Sullivan, J.A., stated:

I agree that the word "proceeding" is one of those words of very wide import that must be interpreted according to the context in which it is used. I do not think that the *ejusdem generis* principle or, perhaps more correctly, the *noscitur a sociis* maxim is decisive. The order is designed to give protection to the receiver-manager appointed by the court in the conduct of his business as a receiver-manager, and I hold that the term "proceeding" in the receivership order embraces a proceeding before the Manitoba Labour Board to obtain certification as a certified bargaining agent.

Counsel for the union also submitted that, even if "proceeding" includes "certification applications," it cannot be said that an application for certification is one taken "against" an employer. He made an attractive argument for the view that the Manitoba Labour Relations Act contemplates that certification is a means of ensuring labour-management harmony and that collective bargaining cannot be considered an adversary procedure. However that may be, I am satisfied that what is contemplated by the receiving order is that leave is necessary for any proceeding which may affect the receiver-manager in the carrying on his business and, therefore, I conclude, contrary to the decision of the learned Queen's Bench Judge, that an application for certification is "a proceeding taken or continued against the Defendant or the Receiver and Manager."

O'Sullivan J.A., was joined by Freedman, C.J.M. in allowing the appeal to the extent of varying the order appealed from to delete the declaration set out and to substitute provision for leave to the International Woodworkers of America, Local 1-324, to continue its application for certification. In granting leave, the majority was mindful of the fact that the appointment of the receiver and manager was not for a limited period. Monnin, J.A., concluded that the receiving order contemplated that leave from the court was necessary for any proceeding or type of proceedings of any nature whatsoever which might affect the receiver and manager in the carrying on of his business. He disagreed with the majority, however, in holding that leave should not be given to the International Woodworkers of America, Local 1-324.

13. For at least the past thirty-five years, the Board has entertained applications for certification and declarations in situations where a receiver and a manager have been involved. See, for example, *Guaranty Trust Co. of Canada* 47 CLLC ¶16,500; *Gravelle Brick Company Limited*, [1965] OLRB Rep. April 50; *Mount Citadel Limited*, [1976] OLRB Rep. July 367; and *The Toronto-Dominion Bank and Price-Waterhouse*



*Limited*, [1979] OLRB Rep. Jan. 50. In *Guaranty Trust Co. of Canada, supra*, the order appointing a receiver and manager contained the following provision:

AND THIS COURT DOTH FURTHER ORDER that no action at law or other proceeding shall be taken or continued against the Defendants or either of them or the said Receiver and Manager with respect to the said property and assets without leave of this Court first being obtained.

A trade union had applied for certification as a bargaining representative. The Board, over the objection of the receiver and manager, held that leave of the court was not necessary and stated:

The respondent, it would appear, bases its second objection upon the ground that the ultimate effect of the present petition may be to diminish the assets which it administers, a result to which it feels it cannot contribute without prior approval of the Court. We would point out that the Board's certificate does not direct the employer to do anything; the Board merely makes findings of fact and certifies bargaining representatives. Should certification be followed by the request of the bargaining representatives that the respondent enter into negotiations with a view to the completion of a collective agreement the respondent must, it is clear, meet and negotiate in good faith with them. However, it cannot seriously be urged that the Board should indulge in conjecture as to the possible outcome of any negotiations which may take place. Considerations of such a hypothetical nature cannot enter into the Board's determination of the issue now before it. It is therefore our conclusion that the objections raised by the respondent are not well founded.

14. The instant proceeding is apparently the first occasion in more than thirty-five years where the jurisdiction of the Board has been challenged when a receiver and manager has been appointed by the Supreme Court of Ontario with a provision in the order of the type referred to in paragraph 9 of this decision.

15. The Manitoba Court of Appeal in *International Woodworkers of America, Local 1-324 v. Wescanna Inn Ltd. and The Clarkson Company Limited, supra*, clearly gave a broad meaning of the word "proceeding." However, the provisions in the order therein are quite general and terse. In the instant case, the provision in the order of Anderson, J., is less general and in its length is more specific, as stated earlier on the issue of when the leave of the court is to be obtained. Even allowing for a broad interpretation of the provision in the order under consideration, there are statutory provisions in Ontario which were not before the Manitoba Court of Appeal. Sections 106(1) and 108 of the *Labour Relations Act*, R.S.O. 1980, c.228, provide:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for

all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

108. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

16. Section 106(1) confers exclusive jurisdiction on the Board to exercise the powers conferred upon it by or under the Act and to determine all questions of fact or law that arise in any matter before it, and section 108 provides that no decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court to question, review, prohibit or restrain the Board or any of its proceedings. The making of an application for the leave of the court could or would constitute a questioning, reviewing, prohibiting or restraining the Board or its proceedings within the meaning of section 108. The exclusive jurisdiction of the Board has been protected by the Legislature and, in our view, the protection afforded by section 108 is sufficiently stated so that the leave of the court is not required by the applicant before it may file and present this application before the Board.

17. The Registrar is directed to list this matter for continuation of hearing on the merits.

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**2641-82-M** The IBEW Construction Council of Ontario, and the International Brotherhood of Electrical Workers, Local 594, Applicant, v. The Electrical Contractors Association of Ontario, and **Ron Pleau Electric Ltd.**, Respondents

Construction Industry Grievance - Practice and Procedure - No grievance filed with employer or placed with Board - Board finding procedure irregular but proceeding to hear on agreement of parties - Whether contractors recognized union by signing documents - Whether assurance by union making documents unenforceable

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members J. A. Ronson and C. A. Ballentine.

**APPEARANCES:** *Alexander J. Ahee, Ralph Tersigni and Pat Walsh for the applicants; Robert Sheppard and Terry V. McCann for Ron Pleau Electric Ltd.*<sup>77</sup>

**DECISION OF THE BOARD;** March 3, 1983

1. These proceedings arise out of a purported referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.

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3. At the commencement of the hearing, it became apparent that no grievance had either been served on the respondents or filed with the Board, although the "referral form" did allege that Ron Pleau Electric Ltd., had violated the provincial agreement entered into between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario ("the Provincial Agreement").

4. The Board's jurisdiction to deal with alleged violations of collective agreements in the construction industry is set forth, as follows, in section 124 of the Act:

"124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the



referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.”

5. It is clear from the wording of section 124 that if a trade union is of the view that an employer has violated the terms of a collective agreement, and the matter cannot be resolved informally, then its next step is to deliver a written grievance to the employer setting out the alleged violation. Once the grievance has been delivered, then either the union or the employer may elect to refer the grievance to the Board for a determination pursuant to section 124 of the Act rather than have the matter proceed to arbitration under the procedures set forth in the collective agreement. If the grievance is referred to the Board, the Board acts in the same manner as does an arbitration board. That is, the Board assesses the validity of the allegations set forth in the grievance. Having regard to the requirements of section 124, the Board advised the parties that since no grievance had been filed with the respondents, or placed before the Board, the proceedings were clearly deficient. At that point, counsel for the applicants and counsel for Ron Pleau Electric Ltd. agreed that instead of delaying the matter so as to provide the applicant with an opportunity to properly file a grievance, they would prefer to litigate and have the Board determine, the key issue of whether or not Ron Pleau Electric Ltd. is bound by the terms of the provincial agreement. If the company is not bound by the terms of the agreement, then no subsequently filed grievance could be successful. The Board agreed to proceed on the basis of this agreement between the parties.

6. Ron Pleau Electric Ltd. is a relatively small electrical contractor based in the City of Pembroke. Pembroke is the largest centre in Renfrew County. Prior to 1978 the International Brotherhood of Electrical Workers included Renfrew County within the jurisdiction of its Local 598 based in Ottawa. Indications are that the Ottawa Local never entered into formal collective agreements with any of the Renfrew County electrical contractors.

7. The International Brotherhood of Electrical Workers, Local 594 (which hereinafter will generally be referred to simply as “the union”) was chartered in June of 1978 with jurisdiction in Renfrew County. Mr. Pat Walsh, an outgoing and very friendly individual, was selected as the local’s first business manager. Mr. Walsh was known to, and respected by, many of the Renfrew County electrical contractors.

8. When Local 594 commenced operations, it had no formal agreements with any of the Renfrew County contractors. However, a number of contractors did quickly establish informal links with the local. Apparently most of these contractors had been active members of the International Brotherhood of Electrical Workers earlier in their careers, and they continued to carry IBEW cards. Some of these contractors employed members of the union. Certain, but not all, of these contractors agreed to requests by Mr. Walsh that they forward welfare benefits to the union on behalf of those of their employees who were union members. In addition, if so desired by their employees, some of the contractors also made vacation pay payments to the union rather than directly to the employees. The union kept a list of out-of-work members so that contractors could, if they so desired, contact the union for employees. On a relatively small number of projects, this informal connection between the union and the contractors proved to be of direct benefit to the contractors. These were projects where

either the owner-client or a general contractor from "out of town" required that the project be built on a "unionized" basis. Those Electrical Contractors which had informal links with the union were treated as unionized firms for this purpose. Interestingly, even on some of these projects the contractors paid their employees less than full "union rates."

9. Shortly after Mr. Walsh became business manager of the union he set himself the task of formally acquiring bargaining rights with respect to the electrical contractors in the country. A number of contractors who had informal dealings with the union were more than willing to cooperate in this regard. These contractors seem to have been of the view that the union could have a stabilizing influence on the industry, and that through the union the incomes of local electricians might be increased. Although these contractors were willing to cooperate with Mr. Walsh, they were very concerned that they not be put in a position where because of high wages, they would not be able to compete against other area contractors who refused to deal with the union. One of the contractors most willing to cooperate with Mr. Walsh was Mr. Ron Pleau, the owner of Ron Pleau Electric Ltd. Before setting up his own shop in Pembroke, Mr. Pleau had served as the president of the Oshawa local of the International Brotherhood of Electrical Workers. It was Mr. Pleau's hope that a Renfrew County electrical contractors association could be established to both act as a "lobby" with respect to relevant municipal by-laws, and also be a vehicle by which the area contractors could deal jointly with the union. Mr. Pleau envisaged that such a contractors association could bargain the terms of the Renfrew County appendix to the provincial agreement with the union local, and also have some input into provincial bargaining generally.

10. On July 6, 1978 Mr. Walsh met with Mr. Pleau and a few other contractors who were sympathetic to the union. At this meeting, it was agreed that the contractors would each sign a document indicating a connection with the union, but that the documents would only be used by Mr. Walsh as a device to get other contractors interested in dealing with the union. Mr. Walsh expressly told Mr. Pleau and the other contractors present at the July 6, 1978 meeting that the documents would not be used against them. Mr. Walsh himself testified that "I told Pleau I wouldn't use the document, and I didn't use the document." Later during the hearing Mr. Walsh testified that when he told Mr. Pleau that the document would not be used, both he and Mr. Pleau understood that he only meant that any reference in the document to wages would not be used against him. We are satisfied, however, that this was not Mr. Pleau's understanding of Mr. Walsh's comments. In this regard, we would note that the document in fact contained no reference to wages.

11. The typed document which Mr. Walsh asked the contractors to sign, read as follows:

"Local Union No. 594 I.B.E.W., Pembroke, Ontario.

#### L E T T E R   O F   A S S E N T

THIS IS TO CERTIFY that the undersigned firm has examined a copy of the approved collective bargaining agreement between \_\_\_\_\_ and Local Union No. 594, I.B.E.W., AFL-CIO & CLC, dated the \_\_\_\_\_ day of \_\_\_\_\_ 1978.

THE UNDERSIGNED FIRM hereby agrees to comply with all of the terms and conditions of employment contained in the above-mentioned agreement and all approved amendments thereto. It is further agreed that the signing of this LETTER OF ASSENT shall be as binding on the undersigned firm as though it had signed the above referred-to agreement and any approved amendments thereto.

THIS LETTER OF ASSENT, when approved by the International President of the I.B.E.W., in accordance with its Constitution, shall become effective on the 6th day of July, 1978, and shall remain until April 30th, 1980."

It is apparent that the document is in the nature of a "standard form" by which a contractor can agree to bind himself to the terms of some other pre-existing agreement between the union and another employer. In this case, however, the name of "Ron Pleau Electric Ltd." was inserted in the space where normally would go the name of the other employer. Accordingly, what Mr. Pleau signed was a statement indicating that he would comply with the terms of a pre-existing agreement between the union and Ron Pleau Electric Ltd. Since there was, in fact, no such pre-existing agreement, the document signed by Mr. Pleau made little or no sense.

12. Mr. Walsh was true to his word, and did not seek to alter the union's relationship with Ron Pleau Electric as a result of the July 6, 1978 document. For his part, Mr. Pleau continued his practice of employing both members and non-members of the union. The company made benefit payments to the union for its employees who were union members but did not do so for non-members. Except for one "union job" of five days' duration during the summer of 1981, the company paid its employees, including those who were union members, in accordance with local wage rates and not the higher rates provided for in the provincial agreement. Mr. Walsh testified that at some point in 1979 Mr. Pleau hired Mr. Paul Jones, a non-member of the union, and sent him down to the union hall to become a member. The evidence, however, establishes that at the time that Mr. Jones joined the union he was not in the employ of Ron Pleau. Mr. Jones testified that he had decided on his own initiative to join the union and that he did so without any directions or urging from Mr. Pleau.

13. In November of 1979 Mr. Pleau and two other contractors, namely, Mr. R. Davidson and Mr. J. Malette, signed yet another document at Mr. Walsh's request. The document which they signed read as follows:

"SECTION 20 SIGNING PAGE

Dated at *Nov. 22, 1979*, Ontario this *22, 1979*

Day of *November, 1979*.

For the IBEW Construction of  
Local 594, Renfrew [sic] County,  
Pembroke



For the Contractor

*"Ron Pleau"*  
386 Rowan St.  
Business Manager  
Pembroke, Ont.  
K8A-1B2

*"Ray Davidson"*  
Electric Ltd.

*J. I. Malette Elect. Ltd.*  
*"Joseph J. Malette"*

For IBEW Local 594

*"Maurice S. Walsh"*

*"Maurice S. Walsh"*

*"Maurice S. Walsh"*

When this document was filed with the Board it was attached to the back of a lengthy document comprised of copies of both the "Principal Agreement" section of the 1978-80 provincial agreement and the Renfrew County appendix to the agreement. Mr. Walsh testified that the signing page was attached to the other material when it was executed by Mr. Pleau, Mr. Davidson and Mr. Malette. According to Mr. Walsh, when the three contractors signed the document he advised them that they would not actually have to adhere to the wage provisions of the provincial agreement on all jobs, but only on jobs where the general contractor was a unionized firm from out of town.

14. The testimony of Mr. Pleau and the other two contractors contradicts Mr. Walsh's testimony on a number of points. According to the three contractors, Mr. Walsh asked them to sign the document, which he described as a "letter of intent," so that along with a covering letter, which he would draft later, he could use it as an aid in approaching other contractors. In this regard he specifically referred to the county's two largest electrical contractors, neither of which had any dealings with the union. Mr. Pleau testified that Mr. Walsh also stated that he needed the document to show the IBEW that he was making progress in organizing the contractors. According to Mr. Pleau, Mr. Walsh told him that he would tear up the document after one year if he could not also get the other contractors to sign it. Of particular interest in this regard is the testimony of Mr. Pat Wise, the president of the union local. Mr. Wise testified that at the meeting in question "Walsh did say it (the document) would never be enforced or he would rip it up if they wanted." Given this evidence, we are satisfied that Mr. Walsh asked Mr. Pleau to sign the document in question so that he could use it in approaching other contractors, and that Mr. Walsh indicated that no use would be made of the document, at least unless those other contractors also signed it, which they did not.

15. Mr. Pleau, Mr. Malette and Mr. Davidson all testified that when they put their signatures to the document in question, it was only a single page, not attached to either the provincial agreement or the local appendix. We accept their evidence on this point over that of Mr. Walsh. Given what we have found to be the intent of the document, as well as the discussion surrounding it, it is more reasonable that only a single page was involved as opposed to an entire agreement. Further, the condition of the signing page is quite different from that of the other material to which it was attached when filed with the Board. The signing page is creased in a number of places,

one edge is tattered and in one corner there is what appears to be a coffee stain. In short, the page gives the appearance of having been well handled. The pages to which it was attached, however, do not show signs of having been similarly handled.

16. On April 25, 1980, Mr. Walsh met with Mr. Pleau and two other contractors. Mr. Walsh asked the contractors if they would sign a document indicating a willingness to, in the future, negotiate the terms of a local appendix to the 1980-82 provincial agreement. The document which they signed is set out below. Although the document states that tentative agreement had been reached with respect to the terms of a local appendix, it is clear on the evidence that this was not, in fact, the case.

"April 25, 1980

The undersigned Electrical Contractors and Local 594 I.B.E.W., have reached tentative agreement on the Local Appendix of the 1980 Provincial Agreement.

*Signed by Contractors*

"Joseph J. Malette"

"R. C. Electric"

"Ron Pleau"

*Signed by Union*

"Maurice S. Walsh"

"Maurice S. Walsh"

"Patrick J. Wise"

"Keith Jackson".

17. On May 23, 1980 Mr. R. Tersigni, the Provincial Secretary for the IBEW Construction Council of Ontario and Mr. J. Wilson, Labour Relations Consultant to the Electrical Contractors Association of Ontario, travelled to Pembroke to discuss the establishment of a Renfrew County contractors association. Mr. Pleau was the only local contractor to show up at the meeting. During the course of the meeting, Mr. Wilson stated that given the existing circumstances, only the provincial employer bargaining agency had the right to negotiate the terms of the Renfrew County appendix to the Provincial agreement.

18. In January of 1982, Mr. Walsh called two meetings of local contractors to discuss the terms of a new Renfrew County appendix to the provincial agreement. Mr. Pleau and only one other contractor showed up at both meetings. In consequence, Mr. Pleau advised Mr. Walsh that since the other contractors were not interested in the project, he could not continue. It was at this point that the union commenced these proceedings. The union claims that by signing the various documents referred to above, Mr. Pleau legally recognized the union as the bargaining agent of his employees, and in the result he is by law bound by the terms of the provincial agreement.

19. Having been told that the union would not be relying on the documents, we have some doubt as to whether, even if Mr. Pleau had signed a voluntary recognition agreement, it would be enforceable by the union. However, there is no need for us to answer this question. None of the documents signed by Mr. Pleau contained an express recognition of the union as the legal bargaining agent of his employees. The original "letter of assent" stated that Mr. Pleau would be bound to the terms of a non-existing agreement. The second document was headed up only "signing page." The third stated that *tentative* agreement had been reached on a local appendix. This document comes

the closest to containing an implicit recognition of the union as the legal representative of the company's employees. However, it is clear from the discussion surrounding the document that such was not its intent. In these circumstances, we can only conclude that Ron Pleau Electric Ltd. never formally recognized the union as the bargaining agent of its employees. It follows that the firm is not legally bound to the provisions of the provincial agreement. In the result, these proceedings are hereby terminated.

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**1715-82-U** Joseph R. Strong, Complainant, v. Loyal 1005 United Steelworkers of America, Respondent, v. **Stelco Inc.**, Intervener

**Duty of Fair Representation – Unfair Labour Practice – Grievance withdrawn after posting to arbitration – No practice of allowing appeal of union decision in circumstances – No violations established**

**BEFORE:** M. G. Mitchnick, Vice-Chairman.

*APPEARANCES:* Jim Gillen and Joe Strong for the complainant; Martin Levinson, Paul Cavalluzzo, Len Taylor, Cecil Taylor, Dan Lynch, Val Patrick, and Bernie Hanson for the respondent; Paul S. Jarvis, Richard A. Lane and Don W. Bates for the intervener.

**DECISION OF THE BOARD;** March 11, 1983

1. This is a complaint filed under section 89 of the *Labour Relations Act*, alleging that the complainant, Joseph Strong, has been dealt with by his trade union contrary to the provisions of section 68 of the Act. That section provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The origin of the complaint is an "Incident Report," or written reprimand, given to Mr. Strong by his foreman in November of 1980. Mr. Strong and other employees had gone to the locker-room for the start of the ten-minute wash-up period at the end of the day. The foreman encountered Mr. Strong there, and advised him that he was in the locker-room two minutes early. Mr. Strong looked at his watch, and found that the foreman was right. Mr. Strong then went back into the plant area to re-check the clock on the floor, and found that it was running two minutes fast. Mr. Strong explained this to the company, but was given the "incident report" anyway. Mr. Strong testified that when he returned the next day, the company had fixed all the clocks in the plant.



3. Mr. Strong grieved his discipline, and his grievance was carried through all of the steps of the grievance procedure. In May of 1981 his grievance was posted to arbitration, where it sat for many months.

4. In the summer of 1982, the Local held its normal elections, and certain changes in the Executive resulted. Mr. Len Taylor, for example, replaced Mr. Jim Gillen as chairman of the grievance committee. The Divisional Chairman on the grievance committee for Mr. Strong's Division continued to be Dennis O'Brien, but Mr. O'Brien was temporarily transferred to a special benefits committee because of the unusual number of lay-offs occurring in the plant. As a result, Danny Lynch was appointed to take Mr. O'Brien's place on the grievance committee. Normally a "moratorium" is placed on grievances and arbitration during contract negotiations at the plant, and a subcommittee is struck to attempt to settle all outstanding grievances. In the 1981 negotiations, which concluded in November of that year, these efforts were only partially successful. All of the "language" grievances were dealt with, but not the discipline ones like Mr. Strong's. As a result, the incoming grievance committee was faced with a backlog of some 200 arbitration cases left over from the prior collective agreement. Len Taylor obtained approval from the Local's President, Cecil Taylor, to meet with the company and discuss, on an individual basis, all of these outstanding grievances, with a view to resolving them. These efforts were largely successful, and Mr. Strong's grievance was one of the ones withdrawn in the process. There is a conflict in the evidence as to whether Mr. Strong was told before the fact or only after that his grievance was being withdrawn. For the purpose of this case, the Board is prepared to accept Mr. Strong's recollection as the accurate one, and to find that the discussion of his grievance took place *after* he received the following letter:

November 5, 1982

Mr. J. Strong,  
24 Wise Cres.  
HAMILTON, Ontario

*Reference: no. 2775 – Incident Report*

Dear Sir and Brother:

After a careful review of all the facts and a further meeting with the company, the grievance committee feels we could not be successful in arbitration.

The committee, therefore, had no alternative but to withdraw, without prejudice, your grievance.

Yours fraternally

"D. Lynch/h"  
D. Lynch  
Acting Chairman Division No. 4  
LU 1005 Grievance Committee

opeiu 343/h

What *is* clear is that Mr. Lynch talked to both Mr. O'Brien and Mr. Gillen about the facts set out in Mr. Strong's grievance file, and confirmed from them that what the file contained was accurate. Mr. Lynch asked them why then, based on the acknowledged fact that Mr. Strong's own watch showed he was two minutes early, his grievance had been posted to arbitration. Both men replied that they realized the union could not win on Mr. Strong's grievance, but had held it out in arbitration in the hope of winning some kind of a settlement for him in the 1981 negotiations. Mr. Gillen, the former grievance committee chairman, and Mr. Strong's spokesman at the Board hearing, confirmed in his evidence that this is the explanation he gave to the new Executive.

5. Mr. Strong, however, was upset with the committee's decision, and phoned Mr. Taylor to find out why his grievance had been dropped. Mr. Taylor explained the response he had gotten from Mr. Gillen, and also pointed out that, in his experience, a written reprimand was "spent" on a man's record once six to nine months had gone by with no further incident (at that point in time two years had elapsed since the time of the Incident Report in question). Mr. Strong was adamant over the injustice of the Report itself, however, and asked to appeal the committee's decision. Mr. Taylor advised Mr. Strong that no avenue of appeal remained open, and that if he still felt unfairly dealt with, his only recourse was to the Labour Board.

6. The parties are in agreement that the only issue for the Board to determine is whether Mr. Strong had a right to appeal the committee's decision. This particular bargaining unit is composed of 12,000 employees (at full strength), and averages 350-400 grievances a month. It averages two and a half days at arbitration each week. In addressing the question of Mr. Strong's right of appeal, it is important to recognize the express limitations placed by Courts, as well as this Board, on the impact of the "duty of fair representation" on a trade union's otherwise unfettered authority as exclusive bargaining agent under the Act. From the earliest articulations of this duty, which is now enshrined in section 68 of our Act, it has been made clear that an employee in the bargaining unit has no absolute right to have his grievance processed or arbitrated. In *Nick Bachi*, [1975] OLRB Rep. Dec. 919, for example (a case involving this same bargaining unit), the Board observed:

12. An employee has no absolute right to have his grievance taken to arbitration. And a trade union, as an employee's exclusive bargaining agent, has the legal authority to settle or withdraw a grievance without an employee's consent. The labour relations policy supporting this legal conclusion was made express in the following excerpt taken from *Vaca v. Sipes* (1967) 386 U.S. 1971:

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In LMRA Section 203(d), 29 USC Section 173(d), Congress declared that "Final adjustment by a method agreed upon by the parties is ... the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining

agreement." In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavour in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedure. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as a statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956).

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievance to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully . . . . It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by LMRA Section 203(d), *supra* if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievance unilaterally to invoke arbitration. Nor do we see substantial danger to the interest of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration.

A trade union regularly acts through its officers, and their authority to deal with grievances in the manner described above is subject only to the limitations placed upon it by the body of the trade union as a whole. There would be, therefore, no "right" of appeal for an employee of a decision of the appropriate trade union officers at *any* stage of the grievance/arbitration procedure, absent any specific regulation or practice within the trade union establishing such a right. Where such a right *has* been established within a trade union, however, the denial of that right to one individual, when all others have been granted it, would raise an inference of arbitrary or discriminatory



conduct on the part of the trade union, and that is precisely the claim of the complainant in the present case. Both sides here acknowledge that an appeal system exists, and has always existed within this Local. The only dispute is as to the extent of its application, in terms of the various stages of the grievance/arbitration procedure, and that factual question is the sole issue before the Board.

7. The instant collective agreement contains a three-step grievance procedure, prior to arbitration. The first step is oral, and can be taken by the employee alone. The second step is to reduce the grievance to writing and request a meeting, and that must be done by the employee's Chief Steward. It is the decision of the Chief Steward whether or not to do that. The third step involves a meeting between the grievance committee and a further company official. It is the decision of the grievance committee whether or not to put the grievance to such third-step meeting. The grievance committee is an elected body and is made up of the 4 Divisional Chairmen, the Recording Secretary (who has no vote), and the Committee Chairman (who has a vote only in the case of a tie). If a third-step meeting is held, the grievance committee then has thirty days from the company's reply to decide whether to post the grievance to arbitration. However, as experience shows, that is not the end of the settlement process; rather, a substantial likelihood still exists that the grievance will be given a further look and in some manner settled during the period from the posting to arbitration to the conclusion of an arbitrator's hearing. It is the entitlement of the trade union's officers during *this* period to enter into, on proper grounds, a final and binding settlement with the company which is at issue in this case.

8. The appeal procedure which both parties acknowledge in this case was described as follows. If an employee is dissatisfied with a decision of the grievance committee not to refer his grievance from the second to the third step, he can file a letter with the Recording Secretary requesting an appeal, and his appeal is automatically referred to the grievance committee for scheduling at a steward's meeting. If the decision of the grievance committee is upheld at the steward's meeting, the grievor is entitled to file a further appeal to the membership, and a date is again scheduled for a meeting at which that appeal can be heard. Membership meetings, like stewards' meetings, occur monthly, but the evidence is that it normally takes anywhere from four months to a year to reach a membership meeting at which the appeal can be accommodated in the agenda. If an employee is dissatisfied with a decision of the grievance committee not to refer his grievance to arbitration, the same appeal procedures apply. It is after that stage that the dispute lies. The complainant argues that it makes no sense practically to have an appeal procedure which cuts off at that point, and would open the way to obvious abuse on the part of the trade union officers. The respondent argues that it makes no sense practically for it *not* to be able to settle a case on its way to arbitration, including, as so often happens with last-minute preparations, virtually at the door of the hearing, and that the normal appeal procedure would obviously eliminate that ability. It points out that such last-minute settlements have in fact been a regular occurrence in the history of this Local. Given the limitations on section 68 of the Act, it is not the function of the Board to decide whether a right of appeal ought, as a matter of "fairness," to accrue to an individual employee up to or after a particular point in the grievance/arbitration process. That would be an unwarranted intrusion into the internal affairs of the trade union. As noted, the only "right" of appeal generated under the provisions of section 68 would be a right which

the trade union itself has established. It is for the Board to decide on the evidence before it, therefore, whether a right to appeal a decision of the trade union made *after* a referral to arbitration, has been established within this Local.

9. The evidence in that regard was striking, not so much by its conflict, but by the source of that conflict. The Board heard from both sides a number of witnesses intimately familiar with the affairs of this Local, and their understanding of this fundamental aspect of their own procedure appeared to be diametrically opposed. The complainant, besides being active in the Local and testifying himself, called evidence on the practice from Jim Gillen, Brian Atkinson and Ed Sutherland. Mr. Gillen served 6 years as a Divisional Chairman on the grievance committee, and was Chairman of the committee from July of 1979 to July of 1982. Mr. Atkinson was the Chairman of the grievance committee for the 3 years prior to Mr. Gillen, and served as a Divisional Chairman for 3 years before that. Mr. Sutherland has been active in the union for many years, and is currently Recording Secretary. Each of the complainant's witnesses testified that they had never heard of a member's request for an appeal being refused at *any* stage.

10. The respondent called Cecil Taylor, Len Taylor, and Danny Lynch to give their own understanding of the practice. Cecil Taylor was grievance committee chairman from 1970 to 1976, and is currently President of the Local. Len Taylor was a Divisional Chairman from 1976 to 1979, and served as Chairman of the grievance committee for 5 months in Mr. Gillen's absence during 1980. He is the current Chairman. Mr. Lynch has also been active in the union and has served as acting Divisional Chairman since the fall of 1982. Each of these witnesses testified that they have never heard of a right of appeal being granted with respect to a decision to withdraw made *after* the matter has been posted to arbitration, and that as far as they were concerned, no such right could or does exist. Len Taylor testified that in investigating this complaint, he pulled the files on any grievances which the complainant's witnesses or anyone else that he talked to had suggested involved appeals beyond a third-stage decision, but in each case found that it was the third-stage decision not to arbitrate which was being appealed.

11. These findings by Mr. Taylor were consistent with what occurred at the hearing. A. Williams grievance, for example, was put to the respondent's witnesses on one day as an example of an arbitration-stage appeal, but the complainant conceded on the next day that, after further checking, the appeal in that case was at third stage only. There was, in fact, not a single case placed before the Board in the three days of hearing which supported the complainant's position in this matter. The only case which the complainant's spokesman himself pointed to, when asked by the Board in argument, was the grievance of Ralph Fish. But what the complainant's spokesman failed to note when the Fish file was examined in evidence, is that the grievance committee decided *after the third stage* not to take the case all the way, and it was *that* decision which the grievor was challenging in his appeal. What has caused the confusion in this instance (and perhaps other instances as well) is that the grievance committee went on to post the matter to arbitration, *solely to protect the time limits*, while the committee's third-stage decision was being appealed. All of this is apparent from the face of the file, but is a distinction to which the complainant and his advisors do not appear at any time to

have turned their minds. The complainant's own evidence was that, as far as he knew, the appeal system was available to everyone, and that the committee *always protected the time limits* while an appeal was being considered. The last time limits under the collective agreement to protect, apart from the simultaneous appointment of the union's nominee, are for the posting of the grievance to arbitration. The complainant's general recollection, therefore, must be of cases where the committee decision being appealed occurred no later than the stage between the third-step meeting and the posting of the grievance to arbitration.

12. One can readily understand the complainant's concern that the denial of a right of appeal *after* the committee has decided to go to arbitration could render illusory the protection supposedly afforded to an individual at the earlier stages of the process. In response to that the Board can only say that if it were shown that an individual's grievance were posted to arbitration solely for the purpose of avoiding the effects of the appeal machinery in place at the earlier steps, that would be a different case than the one presently before the Board. That kind of manipulation would, as well, undoubtedly be subject to significant political checks within the Local. Looking at the respondent's justification for this distinction, the Board does not find it unworthy of belief that a trade union might, for the practical reasons asserted, retain the right to deal more summarily with grievances at the later stages of the grievance procedure. Mr. Gillen, for example, in his own evidence as former committee chairman, acknowledged that he might not be prepared to grant a right of appeal in a case which was being settled only days before a hearing. He says he has always been successful in persuading the grievor at that stage to accept his decision, and testified: "If the man had insisted on a right of appeal, well, I don't know what I would have done." On the basis of the examples before it, the Board has to conclude that that contingency has *not* been tested in the Local, and it cannot be said, accordingly, that any practice of such appeals has been established. Mr. Lane, on behalf of the company, testified that on 5 or 6 occasions immediately prior to an arbitration hearing, Mr. Gillen had approached him to substitute one grievance at the hearing for another, on the basis that he could get the latter one resolved, but needed more time. But Mr. Lane also stated that he assumed that what was happening was that Mr. Gillen was talking to the man, and that, although he (Lane) was aware of some sort of appeal procedure in the union, he was not aware whether any such appeal was involved in the cases he was referring to.

13. Finally, in fairness to the complainant, there was one more case in evidence before the Board which the complainant might have pointed to, and that involved the grievance of Joe Chrysler. Mr. Chrysler's grievance *was* withdrawn from arbitration following a decision to proceed, and he has lodged a letter of appeal with the Recording Secretary. Danny Lynch, as acting Divisional Chairman, testified that he has told Mr. Chrysler that no appeal is available to him at this stage. This is contrary to the impression that Jim Shaw, Mr. Chrysler's Chief Steward, has of the status of the case. But Mr. Shaw acknowledged that he had been off work due to injury for several months prior to the week of the hearing, and Mr. Chrysler apparently could not be located on short notice by the complainant to confirm or deny Mr. Lynch's evidence. In any event, no appeal in the case of Mr. Chrysler has been actually heard yet, so that even if the respondent has yet to take a clear position on it, this single incomplete instance is clearly not sufficient to establish a "practice" of appeals at this stage.



14. The complainant also filed in evidence a number of letters sent to other employees by the grievance committee where a decision was taken to "withdraw, without prejudice, your grievance." Those letters contain an invitation to attend at the Union Hall to discuss the committee's decision by a certain date, whereas the letter to the complainant contained no such invitation. But there was no evidence before the Board to indicate at what stage those other grievances were when the decision was made to withdraw them, so that a case of discrimination cannot be made out from the face of the letters themselves. The respondent's evidence is that the complainant's letter did not contain an invitation because he was at the stage where no right of appeal existed, and, once again, there is no specific evidence before the Board of anyone in exactly the complainant's position having been treated any differently. It should be noted that even the evidence *not* in dispute disclosed limitations on the appeal procedure which have always been accepted in this Local. We are told, for example, that there is no formal right of appeal of a decision of the Chief Steward not to refer a grievance to the second stage. And in the course of contract negotiations, it is common ground that grievances get settled with no right of appeal to the individual employees affected. There is a dispute in the evidence as to whether those settlements are final when signed off by the grievance subcommittee, or only if and when ratified by the full membership as a part of the overall settlement. But even if the latter, it is clear that individual employees, in the course of that overall ratification meeting, have no opportunity to address the membership on the merits of their grievance in the way that they would in a normal appeal.

15. The complainant relies further on the words of the Board in the *Erich Siebert* case, Board File No. 0819-80-U (unreported decision, dated September 9, 1980), at paragraph 19, as follows:

19. A trade union is under a clear duty to make reasonable efforts to contact the grievor before determining to extinguish his grievance rights under a collective agreement (see *Consumers Glass Company Limited*, [1979] OLRB Rep. Sept. 861, at paragraph 19).

Those words are a direct re-statement from the Board in the *Consumers Glass* case. The sole issue before the Board in the *Consumers Glass* case is made apparent in paragraph 3:

At the outset the respondent made its position clear that although the grievance may have lacked merit, the grievance was not withdrawn because it lacked merit.

It was clear from the trade union's evidence that the only reason the grievance was withdrawn was that the Local President decided, after a minimum of inquiry, that the grievor would never be returning from India and had no further interest. The statement of the Board has no application to a situation such as the present where the trade union, after a full investigation and consideration of the chances of success, exercises its normal prerogative to withdraw a grievance. As the Board reiterated in *Siebert*, *supra*, itself:

15. The complainant contends that the respondent breached section 60 of the Act by failing to take his grievance to arbitration.

However, the Board has consistently held that, although section 60 requires a trade union to act in a manner that is not arbitrary, discriminatory, or in bad faith in the handling of grievances, it does not require a trade union to carry any particular grievance through to arbitration simply because the grievor wishes that this be done (see, for example, *Rolland, Inc.*, [1979] OLRB Rep. Dec. 1287; *Douglas Aircraft Canada Ltd.*, [1979] OLRB Rep. 745; and *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618).

The *Siebert* case, however, also arose out of this bargaining unit at Stelco, so that once again the existence of an appeal procedure was acknowledged. But in *Siebert*, as the trade union's letter to Mr. Siebert itself acknowledged, the decision to withdraw the grievance was taken at a time when the grievor's appeal rights remained alive. It was obviously incumbent on the trade union, therefore, in that case to notify the grievor of its intentions in a timely fashion, so as to allow the grievor an opportunity to invoke the appeal rights which he was meant to have. Clearly that requirement in the *Siebert* case has no application to a point in time at which the Board cannot find that any right of appeal was in existence.

16. It should be noted that at the time that the new executive made their decision to withdraw Mr. Strong's grievance, they had the full grievance file before them, containing all of the material which the former executive, after lengthy discussion and investigation, had compiled. And the new executive did check with the former executive to ascertain whether there was anything else that they ought to know about. In doing so, in fact, they were advised that the former executive had also been of the view that the grievance could not be won, but had held it out in the hope of some positive resolution in contract negotiations, which now were past. There was no requirement, in those circumstances, for the new executive to go through the facts of the grievance with the grievor all over again.

17. On the evidence, the Board must find that the respondent retained the prerogative to withdraw Mr. Strong's grievance at the time that it did, and that there was no appeal practice, at least established before this Board, which would prevent the respondent's present officers from taking the position that they did. If the present arrangement is unsatisfactory, it is, as the respondent argues, for the trade union and its members to address. It should also be noted, even though the parties agreed that it was the extent of the "appeal" system which was at issue in this case, that Mr. Strong's grievance was settled on its merits; and further, that its withdrawal without consultation has not been shown to have been inconsistent with the handling of other arbitration-bound grievances resolved at that time, or with what the Board finds to be the good-faith understanding of Local practices on the part of the trade union representatives actually in office at the time of the settlement. There are no "reverse-onus" provisions attaching to a complaint under section 68 of the Act, and a complainant must make out a *prima facie* case of discrimination before the evidentiary onus is transferred to the respondent.

18. For all of these reasons, the complaint is dismissed.

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**0058-82-U The Greater Northern Ontario Trucking Association, Complainant, v. TCG Materials Limited, Respondent**

**Change in Working Conditions – Duty to Bargain in Good Faith – Unfair Labour Practice – Introduction of company owned trucks motivated by need to cut fuel costs – Not resulting in loss of unit work – No breach of freeze provision – Bad faith bargaining not established**

**BEFORE:** E. Norris Davis, Vice-Chairman and Board Members W. H. Wightman and S. Cooke.

**APPEARANCES:** *Rejean Parije, H. Vanderkant and Rejean Lehoux for the complainant; B. R. Baldwin, Ross Karlson and Paul Hurley for the respondent.*

**DECISION OF THE BOARD; March 9, 1983**

1. This is a section 89 complaint in which it is alleged the respondent has contravened sections 15, 66(a), 66(b), 66(c) and 79 of the Act.
2. The complainant is party to a collective agreement with the respondent expiring December 31st, 1982 and covering dependent contractors engaged by the respondent at its Fonthill pit. The allegations that the respondent contravened the Act relate to contract renewal negotiations and to the introduction by the respondent of company owned trucks on November 16th, 1982 and alleged to have displaced bargaining unit members in performance of available work.
3. The facts are relatively not in dispute. At the time of entering into the now-expired collective agreement on March 31st, 1981 there were six persons identified by name as "dependant contractors who are owner operators of trucks engaged by the Employer at its Fonthill Pit" covered by the agreement. Article 6.04 of that agreement provides:

"The drivers on the seniority list shall have first call on deliveries by the company to its customers, where such deliveries are normally performed by the employees."

All employees in the bargaining unit owned tandem trucks capable of hauling 18–22 tons and none of these trucks was big enough to utilize a "pup" attachment which would increase the maximum load to 38–40 tons. While some members have considered the possibility of purchasing a larger tandem and pup, the investment of \$60,000–\$80,000 to do so has discouraged the action.

4. The company, in the operation of its business, is engaged at a number of sites in the province and in various segments of construction material supplies. At two of these other sites the practice has been to deliver aggregate from the pits mostly by independent truckers operating trailers and tandems although at its London site they have for a number of years had a fleet of company owned trucks. This fleet currently includes fourteen tandems of which five or six have pup attachments and deliveries are for the most part done by company vehicles supplemented by independent truckers as



required. At London, as at Fonthill, it is also the practice to quote prices on an F.O.B. pit basis where the customer wishes to use his own delivery vehicle.

5. As of August, 1981, deliveries from Fonthill (other than F.O.B. sales) were made by tandem trucks of bargaining unit members and by independent truckers with trailers and independent truckers with tandems on an "as need" basis. While it was testified that trailers had been used out of Fonthill for some five years, it was the evidence that their use increased significantly with the dramatic increases in fuel costs starting in 1980. The Fonthill operation has two competitors operating contiguously who maintain a fleet of their own trucks, and since a majority of the market is towards St. Catharines, it views the R. E. Law Co. and Walker Bros. as major competitors and in respect to these latter the longer haul trucking rates were becoming more significant and the "ability to compete without trailers was becoming impossible." The complainant also has a collective bargaining relationship with R. E. Law which uses company trucks, and that will later be referred to. In respect to the rates paid to independent truckers, it is noted that a rate scale is established by the Niagara Regional Haulage Association and that the rates are lower than those in the collective agreement and additionally, such rates have not been subject to the operation of a fuel escalation clause such as does exist in the collective agreement between the parties. It is also noted that the Ministry of Transport publishes annual rates applicable to Ministry contracts. These are established after discussions with the Trucking Association and are lower than the Niagara Association rates.

6. A meeting was held in August, 1981 with Mr. Ross Karlson, Vice President - Operations, Mr. Hurley, Sales Representative, and a Mr. Snyder representing the respondent and the six members of the bargaining unit. Karlson testified that he advised the bargaining unit that a good many of the hauls were distance hauls requiring trailers to be competitive, and he asked if the drivers were prepared to increase the size of their trucks or add pup attachments to be competitive with the Niagara Regional Haulers Association rates. There was also discussion of an ambiguity in the collective agreement which the union felt prohibited F.O.B. sales as being contracting out. The company also indicated its concern over the higher unit cost of delivery by tandem versus delivery by trailer. The company also indicated that in quoting for usiness, customers were unwilling to accept two or three tandem loads when one trailer had equal capacity, and even where the respondent used Niagara Association rates in quoting, customers preferred to buy on an F.O.B. basis and engage their own trucks. The company also indicated it might introduce its own trucks. The meeting apparently lasted 1½ with no specific conclusions.

7. Following notice to bargain, a meeting was held on November 17th, 1981. On the day preceding, November 16th, one tandem truck with pup attachment was transferred to the Fonthill pit from the respondent's London operation. It was testified that Karlson had indicated to London that a truck should be moved as soon as it came available and that at the time of movement a number of other trucks had been parked in London because of seasonal fall-off. A similar unit was transferred around December 1st. It was testified that Fonthill had been instructed that these units were not to be used as tandems unless other tandems were not available, and were to be operated as tandems with pups for long distance hauling. It was also testified that in January the Fonthill operation purchased a used truck locally as a fleet replacement which, after

overhaul, was assigned to London Fonthill and one of the trucks returned to London. The evidence establishes that the first London vehicle from November 17th, 1981 to mid January 1982 was operated only as a tandem with pup, and that the second London truck was not operational till January and it was similarly operated as a tandem with pup. Karlson testified that these units were used as tandems without pups for short haul work only if tandems were not available from the bargaining unit or from independent truckers.

8. The company proposals in negotiations included a freeze of rates in the first year of a three-year contract with re-openers in each of the remaining two years: a modification of the fuel escalating clause; and deletion of certain Articles and their replacement by a clause which was a verbatim replica of a clause from the complainant's collective agreement with R. E. Law Crushed Stone and which read:

"The Company agrees to give preference to employees covered by this Agreement, including preference over subcontractors, with respect to the division of work performed by such employees. This preference does not extend to tractor trailer work or work which the employees are not capable of performing or do not possess suitable equipment. Further, it is agreed that this provision does not apply to work involving customer pickups or to work performed by the Company owned vehicles."

At the start of the November 17th meeting the company stated it intended to use company trucks. It is clear that negotiations centered on the volume of work to be done by the bargaining unit which was the union's prime objective and the issue of unit competitiveness which was the company's main objective. The union did concede a wage standstill in the first year although the question of fuel escalation was still an issue. The company proposals relating to work preference to the bargaining unit remained an issue separating the parties. A further meeting was held with a Conciliation Officer on December 22nd, 1981 without any substantial change in position and the No Board Report was issued December 31st. A further meeting on January 18th, 1982 did not move the matter to a settlement.

9. The evidence was that of the original six persons in the bargaining unit, one person has sold his truck, one person works elsewhere and two others work full-time for an employer, Par-Tex. Karlson testified that over the period, company sales have declined by thirty per cent and he would estimate a ten to fifteen per cent increase in customer pick-up volumes. He also estimated that long distance haulage by trailers (and not previously done by the bargaining unit) to have declined ten per cent. He stated company tandems are used only if bargaining unit tandems are not available and pointed out only two bargaining units remain available.

10. The union argued that the respondent by introducing company-owned vehicles effected a change in terms and conditions of employment contrary to section 79 of the Act, and that the respondent's objective in negotiations was not to achieve a collective agreement but to accomplish the elimination of the bargaining unit in contravention of section 15 of the Act.

11. We see no merit to the complainant's argument that by introducing company owned tandems with pups, the company had altered any terms or condition of employment or any right, privilege or duty. There was no evidence that the company-owned vehicles had in any way been used to affect work normally performed by the bargaining unit. The evidence was that such units had been specifically restricted to long distance haulage requiring a tandem with pup or a trailer and the evidence also was that no bargaining unit employee had the equipment capability of performing such work. The intent of Article 6.04 cannot possibly have been to give the grievors a preference in delivery assignments other than for those deliveries the employer required to be done by tandem trucks. It is obvious that deliveries not requiring a tandem truck cannot fall within the meaning of deliveries "normally performed by the employees" as used in Article 6.04 of the collective agreement.

12. The union argued that the inference should be drawn that the introduction of tandem trucks with pups owned by the company can have only been with the objective of reducing the available work to the point where it was no longer economically viable for the individual dependent contractors to maintain their dependency on employment and to thereby eliminate the bargaining unit. The Board is satisfied based on the evidence of the complainant's own witnesses, that the trend to use more and more trailers has been under way since 1979 and that it has continued for the obvious reason of increasing fuel costs. This trend must be related to a degree to customer's pressures in respect to delivery costs. That trend and a general reduction in overall sales is a more likely causative factor. The position taken by the company may be characterized as "hard bargaining" but not such as would justify this Board in concluding that the respondent was not bargaining in good faith. The shift in emphasis in use of equipment here is much akin to technological change in an industrial unit having adverse impact on the bargaining unit and cannot be characterized as bad faith bargaining, and we therefore find no contravention of section 15 of the Act.

13. Based on all the evidence before us, we also conclude that the complaint has failed to establish any contravention of section 66(a), (b) or (c).

14. The complaint is dismissed.

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**1833-82-U Ontario Public Service Employees Union, Complainant, v. The Board of Education for The City of Toronto, Respondent**

**Interference in Trade Unions – Unfair Labour Practice – Employer memorandum prohibiting union activity in employer premises – Subsequent memorandum clarifying that prohibition not applicable during employees' own free time – No anti-union animus – Board finding no violation**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members P. J. O'Keeffe and W. H. Wightman.

*APPEARANCES:* Chris Paliare, Pauline R. Seville and Ivor Oram for the complainant; B. H. Stewart, E. N. McKeown and C. Wooding for the respondent.

**DECISION OF VICE-CHAIRMAN R. A. FURNESS AND BOARD MEMBER W. H. WIGHTMAN; March 4, 1983**

1. The complainant has complained that it has been dealt with by the respondent contrary to sections 3, 64, 66 and 70 of the *Labour Relations Act*. The complainant specifically alleges that on or about December 15, 1982, it was dealt with by Edward N. McKeown, the Director of Education for the respondent, contrary to sections 3, 64, 66 and 70 of the Act in that he did on his own behalf or on behalf of the respondent send a letter, a copy of which was attached to each of the schools which are part of the respondent. The complainant takes the position that the information contained in the letter is wrong and contrary to the Act.

2. In a letter dated January 11, 1983, the respondent adopted the position that the complaint was frivolous and vexatious and that the allegations were so lacking in specificity as to preclude proper preparation for hearing and a proper reply. The respondent requested particulars and specifically inquired what information contained in the letter dated December 15, 1982, was alleged to be wrong and contrary to the Act and how did the information contained in the letter relate to the sections of the Act which the complainant had referred to in its complaint. The respondent also requested to know on which subsections of section 66 the complainant relied.

3. In a letter dated January 21, 1983, the complainant complained that the dissemination of the letter in question by Dr. McKeown was in and of itself a violation of the Act. It was also the position of the complainant that Dr. McKeown knew or ought to have known that each of the principals of the schools to which it was sent would act upon the letter and disseminate the information to the staff of the schools in question. The complainant advised the Board that the letter dated December 15, 1982, was seen by the following individual supply teachers on the following dates:

1. Ms. Marci Tanzer was handed the circular by the secretary at the front office of King Edward Public School on or about December 20 or 21, 1982.

2. Ms. Sharon Campbell saw the circular on January 17, 1983, at Perth Avenue Public School attached to the supply teacher sign-in book on the counter of the main office.

3. Ms. Sharon Bloom saw the circular in the afternoon of January 21, 1983, at Dovercourt Public School posted on the office bulletin board.

4. The letter (or circular) dated December 15, 1982, states:

*THE BOARD OF EDUCATION  
FOR THE CITY OF TORONTO*

December 15, 1982

*WEEKLEY CIRCULAR #82-83:16 SUPPLEMENT*

*SECTION I: INFORMATION FOR PUBLIC AND SECONDARY SCHOOLS*

*OCCASIONAL TEACHERS – UNION ORGANIZATION*

As you know, the Ontario Public Service Employees Union is currently attempting to organize occasional teachers employed by the Board for collective bargaining purposes. Occasional teachers have the right to join a union and participate in its lawful activities. However, solicitation for union membership should not take place during the school day on school premises. At the same time, any form of persuasion against union membership should not take place during the school day on school premises. Employees engaging in any solicitation of support, either for or against union membership, are advised that they will be subject to discipline. Names and addresses of occasional teachers are not to be given to or made available to anyone for any reason other than for the proper operation and management of the school. Such information is private, both to the Board and to the individual occasional teachers. The Board, by policy, has not and will not provide occasional teacher lists to any outside organization.

We hope the above clarifies the Board's position and answers many of the questions which have come forth arising out of the union organizing campaign. The Board's position is not to interfere with the organization of the trade union for occasional teachers.

Questions to principals could arise – re what the process is all about, what would be in the best interest of the occasional teacher in terms of future employment with the Board. Principals, of course, ought not to promote or discourage union membership of occasional teachers. It may be appropriate for principals to indicate that the decision as to union membership is a serious one – that the decision should be made with full knowledge as to the union constitution and by-laws – that occasional teachers ought to clearly

know what their rights and responsibilities are as a union member which, of course, includes union dues and initiation fees.

Edward N. McKeown  
Director of Education

5. The instant complaint was filed on December 23, 1982. On January 18, 1983, the respondent sent a further letter to its elementary and secondary schools. This second letter was distributed to the schools and posted in the same manner as the letter or circular dated December 15, 1982. The letter or circular dated January 18, 1983, states:

*THE BOARD OF EDUCATION  
FOR THE CITY OF TORONTO*

January 18, 1983

*WEEKLY CIRCULAR #82-83: 18 SUPPLEMENT*

*SECTION I: INFORMATION FOR PUBLIC AND SECONDARY SCHOOLS*

*OCCASIONAL TEACHERS - UNION ORGANIZATION*

On December 15, 1982 a supplementary weekly circular was issued to public and secondary schools respecting occasional teachers and union organization. The circular (#82:83:16) concerned the current organizing attempt by the Ontario Public Service Employees' Union to be certified by the Ontario Labour Relations Board as the bargaining agent for occasional teachers.

That circular stated that occasional teachers have the right to join a trade union and participate in its lawful activities, however, solicitation for or against union membership should not take place during the school day on school premises and employees engaging in such activity would be subject to discipline. This statement was made to avoid any disruption in the instruction, supervision and safety of the students in our charge.

The purpose of this circular is to further clarify the Board's position in this matter. Accordingly, please be advised that:

- (1) While employees are on their own time during the school day, they are free to exercise their rights under the Labour Relations Act. Specifically, employees can discuss and attempt to persuade other employees to become or refrain from becoming or continuing to be a member of a trade union while on their own time at school, providing this does not interfere with the work of other employees and/or the students' programme.



(2) The Labour Relations Act gives occasional teachers the right:

To organize themselves; To form, join and participate in the lawful activities of a trade union; To act together for collective bargaining; To refuse to do any and all of these things.

We assure all of our occasional teachers that WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

Principals are again advised they ought not to promote or discourage union membership for occasional teachers.

Please make certain this circular is posted similarly to the circular of December 15, 1982 so that occasional teachers and others will be aware of it.

EDWARD N. MCKEOWN,  
Director of Education.

6. Dr. McKeown gave evidence before the Board. There are one hundred and sixteen elementary schools, thirty secondary schools and a number of alternate schools and special schools in hospitals within the jurisdiction of the respondent. Each elementary school and secondary school has a principal and all secondary schools have a vice-principal to a maximum of four. Approximately half of the elementary schools have vice-principals. Principals and vice-principals in secondary schools are affiliated for professional and collective bargaining purposes to the Ontario Secondary School Teachers Federation (OSSTF). Principals and vice-principals in elementary schools for professional and collective bargaining purposes are affiliated to either the Federation of Women Teachers of Ontario or the Ontario Public School Teachers Federation.

7. The principal is the chief management officer of the school and is responsible for the conduct of the school. The weekly circular or letter referred to previously is the official medium of communication to principals, vice-principals and teachers. Approximately eight hundred copies are circulated to the schools with the number of copies to each school being dependent upon the size of the school.

8. Occasional teachers are employed in both elementary and secondary schools to replace a regular teacher who is absent. The period of absence may vary from half a day to one hundred and ninety-three days. Occasional teachers may be used in any location for varying periods of time. Dr. McKeown was aware in December of 1982 that the complainant was attempting to organize the occasional teachers. Dr. McKeown holds meetings every Monday morning. These meetings last about three hours and are attended by the principal officers of the respondent. Those in attendance are: Dr. McKeown, two associate directors, five senior staff in the central office, and four area superintendents (who are responsible for the elementary and secondary schools in their area).

9. One of these meetings was held on December 6, 1982. During such meetings, the area and division reports are presented and each area superintendent has an

opportunity to make a statement of interest or concern. Three of the area superintendents reported that principals had expressed concern to them about occasional teachers involved in associated duties or in meeting their professional duties and responsibilities being distracted by persons who wished to discuss the formation of a bargaining unit. As a result of this information; Dr. McKeown directed Mr. Halford, the Associate Director of Education – Operations (part of his responsibility is to look after the weekly letter or circular) to see that the document referred to in paragraph four was sent out within the weekly communication.

10. The minutes of the meeting on December 6, 1982, are now set forth:

*PRINCIPAL OFFICIALS MEETING*

December 6, 1982 – 9:00 a.m.

PRESENT: Dr. McKeown (Chairman), M. Darnley, C. Taylor, M. Rose, W. McLaughlin, H. Banks, H. Sissons, B. Snell, D. Rutledge, R. Halford, D. Paton, G. Hayes, W. Wells and R. Pickering.

Prior to the meeting, the Principal officials viewed the film “Energy – A Time for Learning.”

*AREA & DIVISION REPORTS*

G. Hayes reported receipt of a circular, forwarded to all former members of Schedule II staff association (Levels 7-14) inviting them to a meeting on December 15th for the purpose of organizing a “management group” association. Dr. McKeown said he had some concerns about the outcome of the meeting since it was his understanding that there would be no official “recognition” of this group of staff by the Board. As a consequence of these concerns, the Director has asked B. DeGraaf to discuss the matter with W. James.

*G. Hayes also reported that a number of principals of elementary schools have been approached by union organizers for lists of names of supply teachers. As well, some organizers have attempted to enter schools to facilitate the process. Dr. McKeown noted that under the Labour Relations Act, the Board is not obliged to facilitate organization of a union during working hours. He requested R. Halford to prepare a suitable notice for insertion in the Weekley Circular.*

(emphasis added)

M. Darnley reported that, as requested by the Business Administration Committee, the Special Education Dept. is in process of undertaking a transportation survey.

C. Taylor reported that the matter of financial assistance for students of CALC has been raised. Since the students are over 21 years of age, the students apparently do not qualify for such assistance. Dr. McKeown requested that C. Taylor place this item on the agenda for a future meeting of P.O.'s.

C. Taylor indicated the Energy Probe has prepared a speaker's roster and wishes to forward it to the heads of science and geography. There is a \$50. charge for utilizing any resource persons. Dr. McKeown indicated that when the list is forwarded to schools it be clearly indicated that the cost of such resource persons must be a charge against school funds.

C. Taylor reported he has received a proposal from a telephone equipment company regarding equipment which will make up to 500 telephone calls automatically and deliver a prerecorded message. Dr. McKeown suggested that C. Taylor organize a small group, including representatives of the two principals' associations, to look at the equipment and report thereon.

M. Rose reported that the survey on vacant school space has been completed and it was decided that the Area Superintendents would review the report for "glaring errors." It was agreed that the space survey responses should be "dated" to indicate the status of space as of a given time.

11. The wording in the letter dated December 15, 1982, was prepared by the respondent's personnel department in consultation with the respondent's counsel. It was the concern of Dr. McKeown that the educational programme of the students not be disrupted and that teachers involved in associated duties not be distracted. He was also concerned for the safety of students with respect to school yard duties. Dr. McKeown described the duties of regular or occasional teachers in elementary schools. Teachers may be assigned by the principal to yard duty which involves the supervision of pupils while in the school yard outside the school building. Teachers may also be assigned basement duties (where washrooms are located in the basement), hall or stair duties when students move from one location to another, and lunchroom duty. Such duties may be assigned at any time from fifteen minutes before classes commence until thirty minutes after school finishes. It is necessary to prepare activity for the classroom, and teachers have a responsibility and an obligation to see that assigned work is checked or marked. There is a significant amount of time a teacher must spend other than on assigned duties. It is common practice for teachers to use time to prepare material, mark assignments or write material on the blackboard.

12. The expectation in the respondent's schools is that regular teachers will have left an outline of work to be done so that the occasional teacher will carry on with the plan. Many occasional teachers will have with them prepared lessons or assignments which, if necessary, they can use in the classroom where the regular teacher has not left plans for the day. Occasional teachers more than regular teachers find it necessary to work marking assignments during the day. In the junior elementary schools there is a



recess period in the morning and one in the afternoon. In the secondary schools and senior elementary schools regular teachers are engaged in classroom assignments for six of the eight periods in a day. Of the two remaining periods, one period is on call and the regular teacher may be called upon by the principal to fill in as required. The other period is designated as a preparation period which the teacher could use to prepare work or mark assignments.

13. In the spring of 1982, Dr. McKeown was aware that other organizations were interested in representing occasional teachers. These organizations were the Metro Association of Supply Teachers (MAST), the Toronto Union of Supply Teachers (TUST), and the elementary and second school federations referred to earlier. During negotiations for agreements during the 1981-82 school year, these federations had indicated during presentations an interest in representing long-term occasional teachers. MAST and TUST had approached the respondent and asked for lists of names and addresses of occasional teachers so that they might approach them. The position of the respondent was that such lists should not be made available. The respondent adhered to the view that while it did not wish to discourage representation of its employees, it did wish to preserve the privacy of the occasional teachers. With these principles in view, the respondent proposed to enclose notices with its employees' paycheques if both MAST and TUST agreed. These two organizations did not agree and the notices were not sent to the occasional teachers. The employees of the respondent are highly organized and there are eighteen groups or bargaining units. Approximately ninety per cent of its employees are organized and represented by trade unions or other organizations. These bargaining units variously encompass groups of employees such as craft maintenance workers, upholsterers, caretakers, drivers, cafeteria workers, psychologists and social workers, clerical and administrative workers, speech and physical therapists and regular teachers.

14. It was the view of Dr. McKeown that the second long paragraph in paragraph five expressed the respondent's philosophical bent towards the representation of its employees. The last paragraph in paragraph four referred to questions that school principals had been asked. The intent of the letter dated December 15, 1982, according to Dr. McKeown, was that the principals were directed to be as neutral and even-handed as possible, especially since the principals were members of one of two organizations seeking to represent the occasional teachers. Dr. McKeown gave evidence that there was no intention to restrict or prohibit the solicitation of teachers on school premises on their own time. It was Dr. McKeown's position that the letter dated January 18, 1983, represented the position he had intended to set forth in the letter dated December 15, 1982. The respondent has not received any request for clarification of its letter or circular dated December 15, 1982, from either the complainant or an occasional teacher. The respondent has not taken any action against any employee with respect to either letter.

15. The respondent maintains a list of some two thousand occasional teachers. There are occasional teachers whose names appear on this list who may not be called in to work in a school year. The calling in of a particular occasional teacher is a discretionary matter in terms of the right of the respondent to select such a teacher. In the elementary schools, dispatchers, who are senior secretaries, call in the occasional teachers as required. The dispatchers respond to a call from a principal or vice-

principal who may ask for an occasional teacher by name because he or she previously did a good job. However, it may take several telephone calls by the dispatcher to locate any occasional teacher because some occasional teachers are on the lists of more than one board of education. At the secondary school level the call in of occasional teachers is more complicated because of the subject. Most commonly, the teacher will call the department head at school who will then, in most instances, call persons qualified to teach a particular subject.

16. The complainant informed the Board that an application for certification had been filed in Board File No. 1803-82-R. At the time of the hearing of this complaint, the application for certification had not been heard. The complainant argued that the letter in paragraph four had been posted and was intended to be seen by occasional teachers and that there was a very good chance that employees who may have been exposed to this earlier letter may not have seen the letter in paragraph five. The complainant argued that the letter in paragraph four had informed them that they may not engage in union activity on school premises and spelled out the consequences of such conduct. The complainant stressed the vulnerability of the occasional teacher to the pressures executed in the letter in paragraph four and that the concerns over duties and safety could also have been said in one sentence.

17. It was the position of the complainant that the critical part of this case is the remedy. The complainant sought a declaration that the respondent and Dr. McKeown had committed an unfair labour practice and thereby breached the Act. The complainant asked that such a decision be sent to each of the occasional teachers who are the subject matter of the application for certification and that such a decision be posted at each of the schools within the jurisdiction of the respondent. The complainant also asked that the names and addresses of all occasional teachers that have been, or may be, employed by the respondent during the 1981-82 academic year be provided to the complainant in order that they can advise the individuals of their rights under the Act.

18. The respondent maintained that it was unaware of any unfair labour practice where a violation had been found in the abstract. The respondent emphasized that there was no evidence that any employee had been prompted to refrain from exercising the rights (which no one disputes he or she has) because of the letter set forth in paragraph four. The respondent referred to its excellent record in labour relations and to the fact that it has always encouraged its employees to organize. It was urged that the remarks about solicitation were directed to working hours with no intent to proscribe lawful conduct by the employees. The respondent pointed out that there were various organizations in 1982 which were interested one way or another in the representation of the occasional teachers in whole or in part. The peculiar status of its management in the schools was referred to, in that some of the organizations that represented the regular teachers and principals also sought to represent the occasional teachers.

19. The respondent emphasized that its schools are in no way comparable with typical factories or offices and particularly emphasized that there was no period when it could be said that a school is not in operation during a school day. It was conceded that the letter in paragraph four could have been worded in a better way. However, the respondent drew attention to its inexperience under the Act. The respondent referred to its statutory duties under the *Education Act* R.S.O. 1980, c.129 and regulations

thereunder in support of the proposition that a teacher's duty goes well beyond the classroom with regard to the supervision of and responsibility for students.

20. The respondent emphasized that the letter in paragraph four was part of a regular communication and had resulted from questions which had been addressed to the area superintendents. The respondent characterized the remedy requested by the complainant as having no connection with the alleged unfair labour practice and as demonstrating an interest in obtaining names and addresses of employees for other purposes.

21. The decisions relied on by the complainant for its entitlement to a list of names and addresses were decided in other jurisdictions and were not persuasive. Such decisions were decided under different factual situations and under different statutory provisions as in, for example, British Columbia. The most striking feature of this complaint is the absence of any evidence regarding evidence of membership and of any of the employees being affected by the first letter. In addition, there is no suggestion that any employees were in fact disciplined by the respondent. There is no evidence before the Board on how many employees of the respondent read the first letter and how such employees interpreted the letter.

22. The respondent reacted to inquiries from its school principals and in expressing its concerns for the supervision, instruction and safety of its students, issued the first letter. It is admitted by the respondent that its first letter could have been worded in a better manner. We accept the position of the respondent that it did not intend to violate any of the provisions of the Act and did not intend to abridge any of the rights of its employees.

23. The nature of the operation of schools and the broad responsibilities of teachers during the school day, the competing organizations and the concern of the school principals led the respondent to act in the manner referred to earlier. The primary purpose of the first letter was to ensure that the orderly operation of the schools would not be interfered with. In *Associated Medical Services Incorporated*, 64 CLLC ¶16,218, the Board stated at page 980:

Having regard to the provisions of the Act read as a whole, I am of opinion that organization of a trade union and collective bargaining are two of the activities which are contemplated as coming within the scope of section 3 and that freedom to participate in these activities is among the "rights" dealt with by section 50 [now 66] of the Act. The last-mentioned section forbids an employer to "refuse ... to continue to employ a person ... because the person was or is a member of a trade union or was or is a member of a trade union or was or is exercising any other rights under [the] Act." An employer who discharges a person for infraction of a "plant rule" which forbids an employee to exercise his rights under the Act is therefore acting in violation of section 50 [now 66] of the Act. This conclusion does not mean that an employer has been deprived by the legislation of authority to maintain order on his premises and to ensure that productivity will not suffer. If the primary and *bona fide*



purpose of any rule he establishes with regard to activity on his premises outside of working hours or of a kind not covered by section 53 [now 71] is in furtherance of the objectives just mentioned or like objectives, no exception can be taken to the rule, even though an incidental effect of the rule may be to curtail the opportunity a person in his employ has to exercise his rights under the Act.

24. The respondent attempted to remain neutral with respect to the representation of occasional teachers. Even though an employer is not required to stay neutral in an organizing campaign, see *Dylex Limited*, [1977] OLRB Rep. June 357, 366-7, in fact the respondent did remain neutral. In asking employees to consider the question of representation, the respondent did not violate any provision of the Act.

25. The words of the Board in *Consolidated Fastfrate Limited*, [1980] OLRB Rep. April 418, 423, are applicable to the facts of the instant complaint:

Nothing in *The Labour Relations Act* prevents an employer from introducing rules which promote efficiency, or prevent an undue interruption of the production process, and there is no evidence to suggest that the employer in this case had any other motive. Its rule was rather broadly drafted and, *ex facie*, could apply to non-working areas; but with this exception, there is nothing in the form of the rule which supports the complainant's position; nor, since the dissident employee group has never sought the company's permission to distribute literature, can it now claim that the company has exercised its authority in an unreasonable or discriminatory fashion.

26. On the basis of the evidence before it, we are satisfied that the respondent has not violated sections 3, 64, 66 and 67 of the Act. This complaint is therefore dismissed.

#### **DECISION OF BOARD MEMBER P. J. O'KEEFFE;**

1. The facts are as set out in the majority decision and are not in dispute.

2. Having reviewed all the evidence in this case, and keeping in mind the academic background of Edward N. McKeown, I have no hesitation in finding that his letter of December 15, 1982 to the employees involved in this application was a blatant, though sophisticated attempt to frustrate the organizing effort of the applicant union.

3. The subsequent letter of December 23, 1982 from Mr. McKeown to the same employees supports my conclusion in the above in that it can only be viewed in the context of this case as a half hearted attempt to soften the initial offending letter of December 15, 1982.

4. This case cries out for an immediate non-academic, non-hypothetical response by indicating to Mr. McKeown and like employers who would wish to play "big

brother" by inserting themselves into the decision by employees to select the union of their choice that this fundamental right of union selection is the preserve of the individual employee and the organization of his choice. Employer meddling or influence in this civil liberty must not be tolerated in a free and democratic society.

5. The choice of the employer to join the organization of their choice to protect their interest, be it the Ontario School of Trustees Council, Board of Trade, or Chamber of Commerce, is quite obviously the employer's private and "sacred" preserve and decision, and it would be unthinkable by them that their employees would have the right to inject themselves into this right of the employer. It begs the question as to why the employer, as in this case, feels that they have the "master's" right to intervene in the "servant's" legal civil liberty right of joining the union of their choice, when the employer will brook no interference in their like civil liberties.

6. I find that the employer in the instant case committed an unfair labour practice and thereby violated the relevant provisions of the *Labour Relations Act*. In redress, I would require that the employer post the following letter forthwith to each of the employees subject to this application:

*TO: ALL PRINCIPALS, VICE-PRINCIPALS AND OCCASIONAL  
TEACHERS*

*RE - UNION ORGANIZATION*

On December 15, 1982, I as Director of Education, wrote a letter to each of the schools wherein I advised the principals about a number of matters that related to the rights of employees concerning the attempt by the Ontario Public Service Employees Union to organize occasional teachers employed by the Board. That letter contained a number of statements which were unlawful, contrary to the *Ontario Labour Relations Act* and, more particularly, constitute unfair labour practices under that Act. I apologize to any of the occasional teachers who may have either seen the letter or been advised of its contents which were, in fact, unlawful statements.

As you may know, occasional teachers have the right to join a union and participate in its lawful activities. This right is enshrined in the *Ontario Labour Relations Act*.

In my letter of December 15 I stated that solicitation for or against union memberships should not take place during the school day on school premises. Moreover, I stated that employees engaged in any solicitation of support, either for or against union membership, would be subject to discipline. All of the statements are simply a misstatement of the law and are not true.

Employees, including occasional teachers, do have the right to discuss matters that relate to the union on school premises provided that the discussions do not take place during the time at which a

teacher is engaged in work. In other words, discussions about the trade union, including the signing of membership cards can take place on school premises provided it is done before school commences, during breaks or at the end of the school day. Furthermore, employees engaged in solicitation of support for the trade union cannot and will not be subject to any form of discipline.

In my letter of December 15 I also stated that the names and addresses of occasional teachers are not to be given or made available to anyone for any reason other than for the proper operation and management of the school. That statement is also not true. There is nothing improper in providing names and addresses of occasional teachers to those who ask. Furthermore, no one will be disciplined if the names and addresses of occasional teachers are provided to persons who ask for such information.

Furthermore, in my letter of December 15 I advised the principals to provide certain information to occasional teachers who asked questions of them about OPSEU and the organizing campaign. The information which I asked the principals to pass on was designed to dissuade occasional teachers from joining OPSEU and I was wrong to have so advised the principals. I have now, by this letter, instructed principals and vice-principals to remain totally neutral in this organizing campaign and to say nothing one way or the other about the issue of whether or not an occasional teacher should join the union.

Quite simply stated, the Board's position now is that we will not interfere with the organization of the trade union for occasional teachers. I hope that the above clarifies the Board's position and I regret any inconvenience that may have been caused as a result of my earlier letter.

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**0985-82-R** Service Employees Union, Local 210, Affiliated with the Service Employees International Union (AFL-CIO-CLC), Applicant, v. University of Windsor, Respondent

**Bargaining Unit – Practice and Procedure – Representation Vote – Parties having collective bargaining structure for years separating technical employees from full-time office unit – Board “mirroring” part-time unit similarly – Application filed in summer supported by over 55 percent employed at application date – Significant increase in number of employees imminent – Board expressing concern of minority deciding destiny of larger group – Directing vote in circumstances**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members J. Wilson and W. F. Rutherford.

**APPEARANCES:** *Naomi Duguid, Beverly Brush and David Robert for the applicant; D. I. Wakely, Brian P. Smeenk, John R. Dempster, Paul V. Cassano, and J. L. Wheeler for the respondent.*

**DECISION OF THE BOARD; March 18, 1983**

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The parties were in dispute as to the description and composition of the unit of employees appropriate for collective bargaining. In accordance with its usual practice, the Board appointed a Labour Relations Officer to meet with the parties and inquire into the employee lists and the composition of the bargaining unit. After a series of such meetings, the parties arrived at an agreed statement of fact and partial agreement as to the bargaining unit description. On March 2 and 3, 1983, the Board held a hearing to entertain the parties' submissions on the matters remaining in dispute between them.
4. The Board is unanimously of the view that the appropriate disposition of this case involves the taking of a representation vote, but we are equally concerned that such vote be taken quickly. A delay of even a few weeks could prejudice the applicant's rights. Accordingly, in order to expedite the matter, we have decided to render our decision with somewhat abbreviated reasons.
5. What the applicant seeks in this case is a “part-time” “office and clerical” unit which corresponds with the full-time unit which it has represented for many years. The applicant argues that there is an established structure of full-time bargaining units at the University and that the part-time bargaining units should “mirror” these. The respondent asserts that the appropriate bargaining unit should be a “tag-end” unit comprising all unrepresented part-time employees, or alternatively, that it should be the “standard” “office, clerical and *technical*” unit which the Board typically finds appropriate in a university context. The respondent refers to the Board's frequently expressed concerns

about fragmentation, and to a number of decisions involving universities in which the “standard” office, clerical and technical unit has been found to be appropriate.

6. Section 6 of the Act gives the Board a very broad discretion to fashion bargaining units which are appropriate in the particular circumstances of each case; moreover, the Board need only determine *an* appropriate bargaining unit. The unit prescribed may not necessarily be the *most* appropriate unit or the unit which the Board has found appropriate in other cases. Of course, the “standard units” which the Board typically determines are important. They ensure some uniformity in collective bargaining across an industry and, as a practical matter, where a unit has proved appropriate and workable in similar contexts, it becomes a kind of norm to be considered in evaluating the circumstances of particular cases. The standard units inject an element of certainty into the certification process which assists the parties in planning their affairs. On the other hand, the Board cannot ignore the special circumstances of each case, and prominent among them is the existing bargaining unit configuration. Where the parties have fashioned their own bargaining structure and lived with it for many years, the Board is reluctant to disturb or depart from that structure simply because it might not be what we would have done in the first instance. And once the parties have established the configuration of full-time bargaining units, the Board will generally try to define part-time units which correspond to their full-time counterparts. Here, of course, the Board was persuaded in the first instance that office and clerical employees should be grouped in a bargaining unit separate from “technical” employees and, some years ago, issued certificates on that basis. It was only in later years that the Board changed its policy as collective bargaining in the university context became more common, and the Board acquired more insights into University collective bargaining.

7. In the instant case, the parties have lived with the established full-time bargaining structure for many years and there is no evidence before us of serious collective bargaining difficulties which have resulted. No doubt the separation of office and clerical from “technical” employees is unusual, and results in one more full-time and part-time bargaining unit than if the Board applied the policy which later became “standard” in the years after this full-time unit was originally certified. However, we are not persuaded on the evidence before us that there are serious countervailing considerations which militate against “mirroring” the full-time and part-time bargaining structures. Accordingly, we are satisfied that the part-time office and clerical bargaining unit which the applicant seeks is a unit of employees appropriate for collective bargaining.

8. The parties were in dispute as to the status of some twenty-three individuals who work in the University Kinetic Centre, and much of the material before the Board dealt with their duties and responsibilities. We have had some difficulty characterizing their situation – not least because ordinarily they might not be considered either “office and clerical” or “technical employees.” However, as will be seen from an examination of the job titles which the parties agree fall into one group or another, there are a number of inconsistencies and anomalies. Thus, while the matter is not free from doubt, we are satisfied on the basis of the evidence before us that the students share a stronger affinity with the “technical employees” with whom they work directly and who in slow periods perform their job functions, than with the other office and clerical employees who would fall within the applicant’s bargaining unit. Accordingly, we find

that these 23 individuals should not be included in the office and clerical unit which we find to be appropriate.

9. The final matter between the parties concerned the significant increase in the number of part-time employees between August 23, 1982, the date on which the union applied for certification, and a few weeks later, when the academic year got underway. The evidence is that between August 23, 1982 and October 22, 1982 the respondent's complement of part-time staff increased from 152 to 466 (307%), and there was also a significant but less clear increase in the number of jobs or job classifications. There is some dispute as to the proper characterization of some of these employees owing to the unique context and anomalies referred to earlier, however, if the applicant's position is taken at its very best, the size of the office and clerical group which it seeks to represent more than doubled in the weeks immediately following the application for certification. Nor is this surprising since the University's full range of activities is ordinarily carried on between September and May, while the summer months are relatively quiet. But because the union applied for certification during the summer, if we were to consider only the support of the individuals employed at that time, a minority would govern the collective bargaining destiny of the much larger group employed only a few weeks later when the University resumed its regular activities. And, on the evidence before us, we cannot conclude that the minority employed on the application date form a representative core about which the much larger group fluctuates, so that it would be appropriate to base our decision solely on the wishes of the minority. In these circumstances, therefore, the Board has determined that the most appropriate disposition of this case is by means of a representation vote. However, that vote should obviously take place very soon since the end of the school year is rapidly approaching.

10. The Board finds that "all clerical, secretarial and office employees employed by the respondent at Windsor Ontario, for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor, persons employed to undertake specific sponsored research projects, full and part-time officers of instruction together with instructors, sessional appointees, teaching assistants and postdoctoral fellows engaged in teaching and/or research, medical doctors and registered nurses, persons employed in the University Library holding the rank of department head or above, administrative assistants and research assistants and systems analysts and persons above such ranks employed in the University libraries, secretary to President, one secretary to each Vice-President, one secretary to each Assistant Vice-President, secretary to the Director of Personnel Services, secretary to the Manager – Service Records and Benefits, secretary to the Manager – Staff Recruitment, secretary to the Manager – Salary and Wage Administrations, secretary to the Budget Supervisor, programmers and systems analysts, secretary to the Data Base Manager, secretary to the secretary of the Board of Governors, secretary to the Registrar, secretary to the Secretary of the Senate, one secretary to each Administrative Director and person above the rank of Administrative Director, Special Assistants to Deans, secretaries to the University Librarian and secretary to the Law Librarian, supervisor of the Switchboard, Assistant Registrars, Chauffeurs, Institutional Research Analyst, and persons covered by subsisting collective agreements, constitutes a unit of employees of the respondent appropriate for collective bargaining.



11. For the purposes of clarity, the Board notes that "students employed during the school vacation period" refers to such students employed as clerical, secretarial and office employees.

12. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 1, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

14. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

15. The matter is referred to the Registrar.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD FEBRUARY 1983

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**0461-82-R:** Food and Service Workers of Canada, (Applicant) v. Bond Place Hotel, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto employed at the Bond Place Hotel, save and except supervisors, persons above the rank of supervisor, office staff, front desk staff, switchboard operators, security personnel, regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (61 employees in unit).

Unit #2: "all employees of the respondent at the Bond Place Hotel in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, office staff, front desk staff, switchboard operators and security staff." (4 employees in unit).

**1163-82-R:** The International Union of Bricklayers and Allied Craftsmen, Local 12, (Applicant) v. Siesta Masonry, (Respondent).

Unit #1: "all bricklayers and stonemasons and bricklayers' and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in unit).

Unit #2: "all bricklayers and stonemasons and bricklayers' and stonemasons' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in unit).

**1432-82-R:** Graphic Arts International Union, Local 211, (Applicant) v. Parr's Print & Litho Limited, (Respondent).

Unit: "all employees of the respondent at Markham, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, security guard, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (44 employees in unit).

**1599-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Auto-Piper Sewer Systems Inc., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and

maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all employees of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

**1662-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 111, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 10 Sunny Glenway, Don Mills, Ontario, and 5, 25, 35, 40, 50 and 55 Town Houses "Chapel Glen," save and except property manager, cleaning supervisor, office and clerical staff." (8 employees in unit). (*Having regard to the agreement of the parties*).

**1924-82-R:** Bakery, Confectionery & Tobacco Workers' International Union, Local 264, (Applicant) v. Grant Products Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and clerical staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*).

**1933-82-R:** International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. Imperial Painters Decorating, (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

**1936-82-R:** Retail, Wholesale and Department Store Union, (Applicant) v. Safeguard Drugs Limited, (Respondent).

Unit: "all employees of the respondent in its retail drug stores in the City of Ottawa, save and except front store managers, persons above the rank of front store manager, graduate and undergraduate pharmacists, including pharmacy interns and apprentice pharmacists." (27 employees in unit). (*Having regard to the agreement of the parties*).

**2165-82-R:** Energy and Chemical Workers Union, (Applicant) v. Lawrason's Chemical Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, Chief Engineer, all drivers, office and sales staff, chemists, chemists' assistants, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

**2172-82-R:** The International Association of Machinists and Aerospace Workers, (Applicant) v. United Pumps of Canada Limited, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (27 employees in unit). (*Having regard to the agreement of the parties*).

**2186-82-R:** International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. Maple Painting & Decorating, (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipality of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

**2196-82-R:** Ontario Nurses’ Association, (Applicant) v. Dufferin Oaks Home for the Aged, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at Shelburne, Ontario, save and except Assistant Director of Nursing and persons above the rank of Assistant Director of Nursing.” (11 employees in unit). (*Having regard to the agreement of the parties*).

**2217-82-R:** Christian Labour Association of Canada, (Applicant) v. Filuma Door Company Limited, (Respondent).

Unit: “all employees of the respondent engaged in the installation, repairing, servicing and maintaining of doors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**2231-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Yarzab Brothers Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (55 employees in unit).

**2241-82-R:** Service Employees Union, Local 204, affiliated with the AFL, CIO, CLC, (Applicant) v. Lincoln Place Nursing Home, (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff, physiotherapists and occupational therapists, security guards and professional nursing staff.” (17 employees in unit). (*Having regard to the agreement of the parties*).



**2243-82-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Prating Construction Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial, and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**2256-82-R:** Christian Labour Association of Canada, (Applicant) v. Filuma Door Company Limited, (Respondent).

Unit: "all employees of the respondent engaged in the installation, repairing, servicing and maintaining of doors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**2263-82-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Orion Forming Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**2265-82-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Centre Leasehold Improvements Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional

Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**1467-82-R:** The Energy and Chemical Workers Union, CLC, (Applicant) v. Canada Cement Lafarge Limited, (Respondent) v. United Cement, Lime and Gypsum and Allied Workers International Union, AFL, CIO, CLC, (Intervener).

Unit #1: "all employees of the respondent at its warehouse in Metropolitan Toronto, save and except office and laboratory personnel remunerated by monthly salaries, and supervisors above the rank of working sub-foreman." (8 employees in unit).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		4
Number of ballots marked in favour of intervener		3

Unit #2: "all employees of the respondent at its plant in Bath, Ontario save and except office and laboratory personnel remunerated by monthly salaries, and supervisors above the rank of working sub-foreman." (104 employees in unit).

Number of names of persons on list as originally prepared by employer		103
Number of persons who cast ballots	90	
Number of ballots marked in favour of applicant		54
Number of ballots marked in favour of intervener		34
Ballots segregated and not counted		2

**1697-82-R:** United Steelworkers of America, (Applicant) v. E. S. Fox Limited, (Respondent) v. Sheet Metal Workers' International Association Local 568, (Intervener).

Unit #1: "all employees of the respondent in the Niagara Falls save and except foremen, persons above the rank of foreman, office and sales staff, and employees covered by subsisting collective agreements other than the subsisting collective agreement between the respondent and the intervener." (14 employees in unit).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		9
Number of ballots marked in favour of intervener		0

Unit #2: "all employees of the respondent in the Welland Plant, Fabricating Division, save and except foremen, persons above the rank of foreman, office and sales staff, and employees covered by subsisting collective agreements other than the subsisting collective agreement between the respondent and the intervener. (119 employees in unit).

Number of names of persons on revised voters' list		123
Number of persons who cast ballots	116	
Number of ballots marked in favour of applicant		107
Number of ballots marked in favour of intervener		9

**1813-82-R:** Energy and Chemical Workers Union, (Applicant) v. Darling & Company Ltd., (Respondent) v. Teamsters Chemical Energy and Allied Workers Local 424, (Intervener).

Unit: "all employees of the respondent at its Toronto plant and London station save and except working foremen, persons above the rank of working foreman, laboratory, sales and office staff." (23 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		17
Number of ballots marked in favour of intervener		5

### **Bargaining Agents Certified Subsequent to a Post Hearing Vote**

**1685-82-R:** Canadian Union of Public Employees, (Applicant) v. Ontario Cancer Foundation, Hamilton Clinic, (Respondent).

Unit: "all employees of the respondent in the City of Hamilton, save and except supervisors, those above the rank of supervisor, persons covered by subsisting collective agreements, registered nurses and professional treatment and research staff." (8 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		3

### **Applications for Certification Dismissed – No Vote Conducted**

**2164-82-R:** Canadian Union of Public Employees, Local 424, (Applicant) v. The Stratford General Hospital, (Respondent). (128 employees in unit).

**2273-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Peter Cipriano Construction Limited, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener). (3 employees in unit).

**2342-82-R:** The Canadian Union of Public Employees, (Applicant) v. The Catholic Children's Aid Society, (Respondent). (101 employees in unit).

### **Applications for Certification Dismissed Subsequent to a Post Hearing Vote**

**0383-82-R:** Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Hurdman Bros. Limited, (Respondent).

Unit: "all employees of the respondent working at Gloucester, Ontario, save and except foremen and dispatchers, those above the rank of foreman and dispatcher, office and sales staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		8
Ballots segregated and not counted		1



**1868-83-R:** Teamsters Local No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Inter-City Welding Supplies Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Regional Municipality of Waterloo, save and except supervisors, those above the rank of supervisor, office and sales staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		8

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1616-82-R:** Labourers International Union of North America, Local 247, (Applicant) v. International Union of Operating Engineers, Local 793, (Respondent) v. Dibblee Construction Limited, (Intervener).

**1806-82-R:** United Brotherhood of Carpenters' and Joiners of America, Local 494, (Applicant) v. Briar Hill Homes (Windsor Inc.) Marwick Property Management Windsor Inc., (Respondent).

**2146-82-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. A. Lococo Wholesale Ltd., (Respondent).

**2242-82-R:** Hotel, Restaurant & Cafeteria Employees Union, Local 5, (Applicant) v. Harvey's Restaurants Ltd., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Intervener).

**2252-82-R:** Canadian Union of Restaurant and Related Employees, (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q., (Respondent).

**2264-82-R:** Canadian Union of Public Employees, Local 181 (Children's Aid Society), (Applicant) v. The Children's Aid Society of Brant, (Respondent).

**2278-82-R:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. 338579 Ontario Limited O/A R & M Delivery Service, (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**0093-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Mason Windows Limited and Ostapovich Window & Door Components Inc., (Respondents). (*Terminated*).

**1401-82-R:** Local 2041, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ron Engineering & Construction (Eastern) Ltd., Lavictoire Forming & Construction Limited, and Arnon Development Corporation Limited, (Respondents). (*Withdrawn*)

**1748-82-R:** The Carpenters District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 436542 Ontario Limited, carrying on business as Oakdale Drywall & Acoustics; and, Skycon Construction Ltd., (Respondents). (*Granted*)

**1761-82-R:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, The International Union of Bricklayers and Allied Craftsmen, Local 12, (Applicants) v. G. A. Masonry Limited, Eric Doering & Sons Limited, Siesta Masonry, Lodi Developers Limited, (Respondents). (*Withdrawn*)

**1850-82-R:** Local 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ron Engineering and Construction (Eastern) Ltd., Arnon Development Corporation Limited, Arnon Development (1981) Limited, Gilcar Supervision & Management Limited, Lavictoire Forming & Construction Limited, G. Lavictoire and Brothers Ltd. and Ebert Construction (1967) Limited, (Respondents). (*Withdrawn*)

**1932-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Dodge Developments Limited, Menard Structures (Canada) Limited, (Respondents). (*Withdrawn*)

**1950-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. MCI Management Inc., Brierwood Construction Limited, Motorco Savings & Credit Union Limited, Mr. Anthony Tocco, (Respondents). (*Withdrawn*)

**2188-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Steve Devecseri General Carpentry Contracting, Steve Devecseri Construction Limited, M. G. Custom Carpentry, M. Gomori Custom Carpentry Ltd., (Respondents). (*Granted*)

## SALE OF A BUSINESS

**0092-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Mason Windows Limited and Ostapovich Window & Door Components Inc., (Respondents). (*Terminated*).

**1761-82-R:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, The International Union of Bricklayers and Allied Craftsmen, Local 12, (Applicants) v. G. A. Masonry Limited, Eric Doering & Sons Limited, Siesta Masonry, Lodi Developers Limited, (Respondents). (*Withdrawn*)

**2158-82-R:** Millworkers Local 802, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Fort Malden Building Centre Ltd., (Respondent). (*Granted*)

**2187-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Steve Devecseri General Carpentry Contracting, Steve Devecseri Construction Limited, M. G. Custom Carpentry, M. Gomori Custom Carpentry Ltd., (Respondents). (*Granted*)

**2279-82-R:** International Brotherhood of Painters and Allied Trades, Local 200, (Applicant) v. Dieter Meng Ltd., Astrid Meng Ltd., (Respondents). (*Withdrawn*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1439-82-R:** Debbie Pollock, (Applicant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local F73, (Respondent).

Unit: "all office, clerical, secretarial and accounting employees of Warner Bros. Distributing (Canada) Limited in Toronto, Ontario, Canada." (*Granted*)

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		10

**1445-82-R:** Thomas Aold, (Applicant) v. Retail, Commercial & Industrial Union, Local 206, chartered by the United Food & Commercial Workers International Union, CLC, AFL, CIO, (Respondent) v. Comstock Funeral Home Ltd., (Intervener).

Unit: "all employees of Comstock Funeral Home Ltd. employed at Peterborough, Ontario, save and except persons above the rank of manager and regularly employed for not more than twenty-four (24) hours per week." (*Granted*)

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

**1664-82-R:** Giovanni Mitri, (Applicant) v. Canadian Union of Brewery, Flour Cereal, Softdrink and Distillery Workers, (Respondent) v. Miore Distributing Co. Limited, (Intervener).

Unit: "all employees of Miore Distributing Co. Limited, including dependent contractors, employed in the Municipality of Metropolitan Toronto, save and except foremen and supervisors, persons above the rank of foreman and supervisor, and office staff." (*Granted*)

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	9	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		9

**1676-82-R:** Prescott Machine and Welding Inc., (Applicant) v. Energy and Chemical Workers Union and its Local Union No. 1, (Respondent). (*Dismissed*)

**1730-82-R:** Barbara Hurley, (Applicant) v. Labourers' International Union of North America, Local 837, (Respondent) v. The Ressel Day Nursery School Inc., (Intervener). (*Dismissed*)

**1845-82-R:** Alexandra Eadie, (Applicant) v. Canadian Union of Public Employees, (Respondent) v. The Doctors Hospital, (Intervener). (*Dismissed*)

**1874-82-R:** Employees of the Lennox & Addington Family & Children's Services presently functioning as a part of Local 445 of the Ontario Public Service Employees Union, (Applicant) v. Ontario Public Service Employees Union, (Respondent) v. Lennox and Addington Family & Children's Services (Employer). (*Dismissed*)



**1929-82-R:** Lorraine Salvati, (Applicant) v. Union of Canadian Retail Employees, Local 1000A Chartered by the United Food and Commercial Workers International Union, (Respondent). (*Dismissed*)

**2163-82-R:** Antonella Santia, Pat Schin, (Applicant) v. Brotherhood of Airline and Airline Clerks (CLC), (Respondent). (*Granted*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

**1860-82-U:** Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Abitibi-Price Inc., (Respondent). (*Withdrawn*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**0080-82-U:** Labourers' International Union of North America, Local 183, (Complainant) v. Mason Windows Limited and Ostapovich Window & Door Components Inc., (Respondents). (*Terminated*).

**0445-82-U:** Ontario Nurses' Association Staff Union and Margaret O'Connor, (Complainant) v. Ontario Nurses' Association, (Respondent). (*Withdrawn*)

**0774-82-U:** John Varga, (Complainant) v. International Woodworkers of America, (Respondent). (*Dismissed*)

**1042-82-U:** Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Complainant) v. St. Hubert Bar-B-Q Ltd., (Respondent). (*Dismissed*)

**1131-82-U:** Canadian Union of Public Employees and its Local 2664, (Complainant) v. Le Patro d'Ottawa, (Respondent). (*Granted*)

**1225-82-U:** United Steelworkers of America, (Complainant) v. Walbar of Canada Inc., (Respondent). (*Withdrawn*)

**1427-82-U:** Canadian Union of Public Employees, (Complainant) v. Country Place Nursing Homes Limited, (Respondent). (*Granted*)

**1519-82-U:** Ontario Public Service Employees Union, (Complainant) v. The Board of Governors of Sheridan College of Applied Arts & Technology, (Respondent). (*Withdrawn*)

**1617-82-U:** Labourers International Union of North America, Local 247, (Complainant) v. International Union of Operating Engineers, Local 793, and Dibblee Construction Limited, (Respondent). (*Withdrawn*)

**1618-82-U:** Labourers International Union of North America, Local 247, (Complainant) v. Dibblee Construction Limited, (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener). (*Withdrawn*)

**1677-82-U:** Service Employees Union, Local 204, (Complainant) v. Extendicare Diagnostic Services, (Respondent). (*Dismissed*)

**1688-82-U:** Energy & Chemical Workers Union Locals 1, and 513, (Complainant) v. The Consumers Gas Company, (Respondent). (*Withdrawn*)

**1758-82-U:** Labourers' International Union of North America, Local 183, (Complainant) v. Wickford Holdings Limited, (Respondent). (*Withdrawn*)

**1760-82-U:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and The International Union of Bricklayers and Allied Craftsmen, Local 12, (Complainants) v. Jerry Cybalski, carrying on business as Siesta Masonry, Eric Doering, (Respondents) v. Lodi Developers Limited, (Intervener #1) v. Eric Doering and Sons Limited, (Intervener #2). (*Withdrawn*)

**1854-82-U:** Bakery, Confectionary & Tobacco Workers' International Union, Local 264, (Complainant) v. Dare Foods (Candy Division) Limited, (Respondent). (*Granted*)

**1887-82-U:** International Association of Machinists and Aerospace Workers, (Complainant) v. Treco Machine & Tool Ltd., (Respondent). (*Withdrawn*)

**1894-82-U:** Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, (Complainant) v. Carousel Tours/Carousel Travel (1982) Inc., and Toteridge Investments Limited (carrying on business as Carousel Tours), (Respondent). (*Withdrawn*)

**1896-82-U:** William Eugene Woltz, (Complainant) v. United Plant Guard Workers of America (UPGWA) Local 1958, (Respondent). (*Withdrawn*)

**1904-82-U:** United Brotherhood of Carpenters and Joiners of America, Local 93 and Tanguy Duciaume, (Complainants) v. Di-al Construction Limited, (Respondent). (*Dismissed*)

**1905-82-U:** United Food and Commerical Workers International Union, Local 725, (Complainant) v. Tyrebuck Enterprises Limited c.o.b. as Roman's II Health & Recreation Spa, (Respondent). (*Withdrawn*)

**1906-82-U:** Percy Austin, (Complainant) v. United Steelworkers of America, (Respondent). (*Dismissed*)

**1916-82-U:** Canadian Union of Operating Engineers and General Workers, (Complainant) v. Blue Line Taxi Company Limited, (Respondent). (*Withdrawn*)

**1931-82-U:** Reliable Fur Dressers & Dyers Limited, (Complainant) v. Fur, Leather, Shoe & Allied Workers' Union, Local 68, affiliated with the United Food & Commercial Workers' International Union, AFL, CIO, CLC, (Respondent). (*Withdrawn*)

**1938-82-U:** Graphic Arts International Union Local 517, (Complainant) v. Sumner Press, (Respondent). (*Granted*)

**1939-82-U:** Graphic Arts International Union Local 517, (Complainant) v. Curtis Company Limited, (Respondent). (*Granted*)

**1940-82-U:** Graphic Arts International Union Local 517, (Complainant) v. Commercial Printing Company, (Respondent). (*Granted*)

**1941-82-U:** Hotels, Clubs, Restaurants, & Tavern Employees' Union, Local 261, Ottawa, (Complainant) v. Roger Parent, Burger King, (Respondent). (*Withdrawn*)

- 1946-82-U:** United Food and Commercial Workers International Union, AFL, CIO, CLC, (Complainant) v. Primo Foods Limited, Primo Importing & Distributing Co. Ltd., (Respondent). (*Withdrawn*)
- 1244-82-U:** Robert Edward Iles, (Complainant) v. Ian E. Reilly and United Food and Commercial Workers Union, Local 486, (Respondents). (*Withdrawn*)
- 2145-82-U:** Teamsters Local Union No. 419, (Complainant) v. Dominion Citrus & Drugs Ltd., (Respondent). (*Withdrawn*)
- 2151-82-U:** Fireside Inn – William Pannell, (Complainant) v. Service Employees International Union 183, (Respondent). (*Withdrawn*)
- 2154-82-U:** Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. A. Lococo Wholesale Ltd., (Respondent). (*Withdrawn*)
- 2168-82-U:** Canadian Union of Public Employees, (Complainant) v. Under 21 Toronto, (Respondent). (*Withdrawn*)
- 2171-82-U:** United Steelworkers of America, (Complainant) v. White-McKee Inc., Coopers & Lybrand Limited, Continental Bank of Canada, (Respondents). (*Withdrawn*)
- 2179-82-U:** Canadian Union of Public Employees and its Local 2664, (Complainant) v. Le Patro D'Ottawa, (Respondent). (*Withdrawn*)
- 2182-82-U:** Barrington Morrison, (Complainant) v. Weldo Plastics Limited, and International Leather Goods, Plastics and Novelty Workers Union, Local 8, (Respondents). (*Withdrawn*)
- 2183-82-U:** G. Marra, (Complainant) v. United Steelworkers of America, Local 14831, (Respondent). (*Withdrawn*)
- 2189-82-U:** Peter George, (Complainant) v. Babcock & Wilcox Ind. Ltd. & United Steelworkers of America Local 3859, (Respondents). (*Withdrawn*)
- 2190-82-U:** Labourers' International Union of North America, Local 183, (Complainant) v. York Condominium Corporation No. 190, (Respondent). (*Withdrawn*)
- 2198-82-U:** Canadian Union of Public Employees, Local 543, (Complainant) v. The Corporation of the City of Windsor, (Respondent). (*Withdrawn*)
- 2209-82-U:** Tremways Drivers Association, (Complainant) v. Tremways (1982) Limited, (Respondent). (*Terminated*).
- 2210-82-U:** Victor G. Mutart, (Complainant) v. E. S. Fox Limited, (Respondent). (*Dismissed*)
- 2229-82-U; 2230-82-U:** International Ladies' Garment Workers' Union, (Complainant) v. The Sigal Shirt Company Limited, (Respondent). (*Withdrawn*)
- 2237-82-U:** Sinclair O. Adams, (Complainant) v. Ford Motor Co. of Canada and United Auto Workers Skilled Trades, (Respondent). (*Withdrawn*)
- 2246-82-U:** Rosa Cappelli, (Complainant) v. Retail, Wholesale and Department Store Union, Local 582, (Respondent). (*Withdrawn*)



**2250-82-U:** Tim Cormier, (Complainant) v. Labatts Brewery Local 304, (Respondent). (*Withdrawn*)

**2260-82-U:** Chandra Prashod, (Complainant) v. Laura Secord Candy Shop and Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, (Respondents). (*Withdrawn*)

**2266-82-U; 2267-82-U:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Budget Rent a Car, (Respondent). (*Withdrawn*)

**2282-82-U:** Roy Stewart Hillier, (Complainant) v. Inco Metals and USWA, Local 6500, (Respondents). (*Withdrawn*)

**2285-82-U:** United Food and Commercial Workers International Union, Local 1105P, (Complainant) v. Paris Poultry Products Limited, (Respondent). (*Withdrawn*)

**2299-82-U:** Leonard Belford, (Complainant) v. The Ottawa–Carleton Public Employee's Union, C.U.P.E., Local 503, (Respondent). (*Withdrawn*)

**2300-82-U:** Jack Longchamp, (Complainant) v. The Ottawa–Carleton Public Employee's Union, C.U.P.E., Local 503 (Respondent). (*Withdrawn*)

**2313-82-U:** Leonard Belford, (Complainant) v. The Ottawa–Carleton Public Employee's Union, C.U.P.E., Local 503 (Respondent). (*Withdrawn*)

**2348-82-U:** Peter George, (Complainant) v. Babcock & Wilcox Inc. Ltd., United Steelworkers of America, Local 2859, (Respondents). (*Withdrawn*)

**2368-82-U:** Charles Czetner, (Complainant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Withdrawn*)

**2407-82-U:** William Egan, (Complainant) v. Trial Board of the International Brotherhood of Painters and Allied Trades, Local 1783, (Respondent). (*Granted*)

## APPLICATIONS FOR CONSENT TO PROSECUTE

**1689-82-U:** Energy & Chemical Workers Union, Locals 1 and 513, (Applicant) v. The Consumers Gas Company, (Respondent). (*Withdrawn*)

## APPLICATIONS FOR RELIGIOUS EXEMPTION

**2305-82-M:** J. J. Sidorko, (Applicant) v. Energy and Chemical Workers Union, Local 672, (Respondent #1) v. Dow Chemical Inc., (Respondent #2). (*Dismissed*)

## APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

**1895-82-M:** Famz Foods Limited carrying on business as Swiss Chalet Bar-B-Q, (Employer) v. Canadian Union of Restaurant and Related Employees, (Trade Union). (*Granted*)

## JURISDICTIONAL DISPUTES

**0012-82-JD:** United Paperworkers International Union AFL, CIO, CLC, Kenora Local 1330, (Complainant) v. Boise Cascade Canada Ltd., and International Union of Operating Engineers, Local 940, (Respondents). (*Granted*)

**1775-82-JD:** E. S. Fox Limited, (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local 2486, (Respondent). (*Withdrawn*)

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**2392-81-M:** Plummer Memorial Public Hospital, (Applicant) v. Ontario Nurses Association, Local 103, (Respondent). (*Granted*)

**1127-82-M:** Canadian Union of Public Employees, Local 1997, (Applicant) v. Eastern Ontario Health Unit, (Respondent). (*Dismissed*)

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**2339-82-R** Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **BioShell Inc.**, Respondent, v. Canadian Paperworkers Union, Intervener, v. Group of Employees, Objectors

**Certification – Representation Vote – Practice and Procedure – Reconsideration – Both applicant and intervener demonstrating membership support in excess of 55 percent – Board initially directing three way vote – Eliminating “no union” option from ballot on reconsideration**

**BEFORE:** Pamela C. Picher, Chairman and Board Members W. H. Wightman and Stewart Cooke.

**DECISION OF THE BOARD;** April 27, 1983

1. This is an application for certification. Both the applicant and intervener have applied to be certified for a group of employees who are not presently represented by a trade union.

2. By a decision dated March 21, 1983 the Board ordered that a representation vote be taken among the employees in the bargaining unit to determine whether the applicant or the intervener union should be certified as the exclusive bargaining agent.

3. No representations were made at the hearing concerning the options that should be made available to the employees on the voting ballot. The parties did not address the issue of whether the ballot should provide employees with a choice between the two competing unions only or whether it should include as well a no union choice. In the absence of representations, the Board directed that the ballot include a no union option in addition to a choice between the two competing unions.

4. Following the issuance of the Board's decision the applicant union requested that the Board reconsider its decision and direct that the employees be given a choice between the two competing unions only, thereby eliminating the no union option from the ballot. The Board is in receipt of representations from the intervener union endorsing the applicant's request for reconsideration; counsel for the respondent company submits that the Board should maintain the no union option.

5. A review of the jurisprudence reveals that the Board has not taken a single approach to the structure of the ballot when directing representation votes in non-displacement applications for certification where two applications have been consolidated and processed together.

6. In *Wholesale Homes Ltd.*, [1971] OLRB Rep. Dec. 818 the Board directed that the voters be given a choice between no union and the two competing unions. In that case the applications for certification both requested pre-hearing votes. If the applicant's application had not been consolidated with the intervener's application and had been processed on its own, the employees would have been given a no union choice in the pre-hearing representation vote. In addressing the question of the appropriate

structure of the ballot, the Board stated that the voters should not be deprived of the no union choice they would otherwise have had simply because the Board had consolidated the two applications for certification. At pp. 820-821 the Board said,

9. If the Board had postponed the Labourers' application pursuant to the provisions of section 92(3)(b) until after the Carpenters' vote was conducted, the ballot on the carpenters' vote would have offered the employees an opportunity to indicate that they did not wish to be represented by the Carpenters. That opportunity should therefore not have been denied the employees merely because the two applications were consolidated by the Board's decision of October 13, 1971.

10. ... Where an opportunity is not provided employees to participate as parties and where, as in this case, two unions have applied to represent employees who are not currently represented by any trade union, the Board should formulate the ballot in order to offer the voters an opportunity to express their wishes with respect to the question whether they wish *no trade union* to represent them.

7. In *H.D. Lee Company of Canada Limited*, [1974] OLRB Rep. Nov. 812 the Board, on somewhat different facts, followed the approach it had taken in *Wholesale Homes Ltd.*, *supra*. The applicant had membership support of more than 65 per cent of the employees in the bargaining unit. The intervener had membership support of not less than 35 per cent. In these circumstances and relying on its decision in *Wholesale Homes Ltd.*, the Board included a no union option on the ballot in the ensuing representation vote.

8. A similar situation arose in *Medi Park Lodges Inc.*, [1977] OLRB Rep. Oct. 635. The applicant union had more than 55 per cent membership support from among the employees in the bargaining unit. The intervener union which had applied by way of pre-hearing vote had less than 45 per cent but not less than 35 per cent support. The Board reviewed the membership cards filed on behalf of each union and noted that a substantial number of employees had signed cards in both unions. The Board included a no union option in the resulting representation vote.

9. The Board has not always directed that the employees be given a no union option in a representation vote ordered in a non-displacement application for certification which has been processed with a second application. In both *T.R.S. Food Services Limited*, [1976] OLRB Rep. Apr. 154 and, coincidentally, *T.R.S. Food Services Limited*, [1980] OLRB Rep. Mar. 360 the Board directed that in the representation vote the employees should be given a choice between the two unions only; a no union option, therefore, was not included on the ballot. In contrast to the cases noted above, both the applicant and intervener in each of these two cases had membership support in excess of 55 per cent, a possibility which obviously results from some overlap in the membership evidence. Some employees had signed membership cards in both unions.

10. The present situation before the Board is parallel to the circumstances in the two *T.R.S. Food Services* cases. Both the applicant and intervener union submitted



membership evidence in excess of 55 per cent. In *Wholesale Homes, supra*, the Board noted that if the applicant's application for certification had been processed by itself, the employees would have been entitled to a no union option in the representation vote. The Board stated that in such circumstances it did not feel that the employees should be deprived of the no union option simply because the Board, in the due exercise of its discretion, had processed both applications together.

11. In contrast to the circumstances in *Wholesale Homes*, however, it cannot be said in the instant situation that if the applicant's application had been processed on its own, the employees would have been entitled to a vote with a no union option. If the Board had not consolidated the two applications for certification and the applicant's application had been considered on its own, the employees would not have had a vote; the membership support for the applicant in excess of 55 per cent would have, in the circumstances of this case, enabled it to be certified outright, without a representation vote.

12. To follow the two *T.R.S. Food Services* decisions and conclude in the instant situation that the representation vote should be a vote between the two unions alone would not be inconsistent with the Board's reasoning in *Wholesale Homes* even though the outcome would be different. The employees would not be deprived of a choice they would have had if it had not been for the intervention application. In the instant situation the employees would not even have been entitled to a representation vote, quite apart from a no union option, if the applicant's application had been processed alone. Moreover, the objecting employees did not appear at the Board's hearing to speak to their statement of desire so the employees would not have become entitled to a vote and a no union option through the petition.

13. Eliminating the no union option in the circumstances before us responds more directly to the expressed views of the employees. When two unions come before the Board with membership evidence in excess of 55 per cent such that each, on its own, has a level of membership support that would normally enable it to be certified outright, the contest is properly viewed as a contest between the unions. The unresolved question is not whether the employees want a union but rather which union they want.

14. The existence of overlapping membership support, where some employees have signed membership cards in both unions does not, in the Board's view, run counter to the conclusion that the outstanding question is which union the employees want. In an ordinary application for certification the Board does not consider whether a person has signed a membership card in another union. The Board assesses how many employees have signed membership cards in the union whose application is under consideration. Evidence that the person also belongs to another union has never been viewed by the Board as a factor casting doubt on the reliability of the membership cards submitted to the Board to support the application under review.

15. Similarly, in the instant circumstances, the Board is satisfied that the overlapping membership evidence between the applicant and the intervener does not raise a doubt about the reliability of the membership cards as evidence of the employees' desire for representation by a trade union. It may simply raise a question as to which union they want as their bargaining agent.

16 The situation of overlapping membership cards should be distinguished from a numerically relevant and voluntary petition. When an employee voluntarily signs a statement of desire against an application for certification after he has previously signed a membership card in the union, he has at one point shown the desire to be represented by a union and shortly thereafter displayed the opposite desire. The change of heart casts some doubt on the reliability of the membership card as an expression of the true wishes of the employee. To resolve the doubt, if the petition is numerically relevant, the Board orders a representation vote. The doubt that is created by an employee voluntarily signing a petition against the union subsequent to signing a membership card in the union is whether the employee wants to be represented by the applicant union or would rather have no union. In the resulting representation vote, therefore, the employee is given the choice between the union and no union.

17. On the other hand, when an employee signs a membership card in both the applicant and intervener unions, the doubt that is created is a doubt as to which union the employee wants, not a doubt about whether he wants to be represented by a trade union. That doubt may be resolved by a representation vote giving employees a choice between the two unions only. To include a no union option would cloud the real issue remaining in dispute.

18. The discretion provided the Board in section 103(6)(a) of the Act indicates that the Legislature anticipated that there would be occasions when the Board would consider it appropriate in a representation vote to provide employees with a choice between two unions only. Section 103(6) reads as follows:

103.-(6) Where in the taking of a representation vote, the Board determines that the employees are to be given a choice between two or more trade unions,

- (a) the Board *may* include on a ballot a choice indicating that an employee does not wish to be represented by a trade union; and
- (b) the Board, when it decides to hold such additional representation votes as may be necessary, may eliminate from the choice on the ballot the choice from the previous ballot that has obtained the lowest number of votes cast.

[emphasis added]

19 Relying on the considerations set out above the Board draws the following conclusion: When a non-displacement application for certification making no request for a pre-hearing vote is filed with the Board and the Board, pursuant to its discretion in section 103(3)(a), treats a subsequently filed application for certification as having been made on the date of the making of the original application, thereby processing them together, and both unions have membership support in excess of 55 per cent, the representation vote ordered by the Board will normally provide the employees with a choice between the two unions only. Where, however, objecting employees establish a numerically relevant and voluntary petition, the Board will normally include a no union option in the representation vote since the employees would have been presented with

that option if the union's application had been processed on its own. Moreover, in a given situation, there may be additional factors which do not exist in the instant matter, such as charges against union membership evidence, which might, depending on the circumstances, cause the Board to include a no union option notwithstanding membership cards in excess of 55 per cent.

20. In the instant application, however, there were no charges against either union's membership evidence. Moreover, although a statement of desire was filed with the Board no objecting employee appeared at the hearing to give evidence in support of the petition. Accordingly, the Board, following its normal practice, gave the petition no weight. The Board, therefore, has before it clear membership evidence from both the applicant and the intervener of more than 55 per cent of the employees in the bargaining unit.

21. For the reasons set out above, the Board, in the exercise of its discretion under section 106(1) of the Act amends its decision dated March 21, 1983 and directs that the voters be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

22. The matter is referred to the Registrar.

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**2526-82-R** Linda Warner, Applicant, v. Office and Professional Employees International Union Local 343, Respondent, v. Alex Smith, President **Buntin Reid Paper**, Intervener

**Petition – Practice and Procedure – Termination – Timely petitions and counter-petitions filed – Board policy to be governed by last timely voluntary statement – Board checking documents to ascertain last statement of each person signing both petition and counter-petition**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members J. A. Ronson and B. Lee.

**APPEARANCES:** *Linda Warner for the applicant; Janice Best and Lynda Cook for the respondent; Alex Smith for the intervener.*

**DECISION OF THE BOARD;** April 21, 1983

1. This is an application under section 57 of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent union for a unit of all employees of Buntin Reid Paper (Division of Domtar Inc.) located at its office in Toronto with the exception of the following:

- (1) Assistant managers, persons above the rank of assistant managers;

- (2) Salesmen, order department supervisor, secretaries to the president and controller;
- (3) Persons covered by subsisting collective agreements between Buntin Reid Paper Division of Domtar Inc., and the Canadian Paperworkers Union, Local 1291;
- (4) Students employed during the school vacation period;
- (5) Temporary personnel.

A temporary employee is one who is hired for a work assignment of limited or pre-determined duration and shall include students and vacation relief.

There is no dispute that this is a timely application.

2. Section 57(3) of the Act states:

Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

3. There was filed in support of the instant application, statements of desire signed by slightly in excess of forty-five per cent of those in the bargaining unit. The Board heard evidence in respect of the circumstances under which the signatures were affixed to these statements of desire and is satisfied on the evidence before it that these statements constitute a voluntary expression of those who signed.

4. There was also filed with the Board in this matter a number of statements in opposition to the application to terminate bargaining rights. Two of those who signed statements of desire filed in support of the application also signed statements in opposition to the application. The preamble to the statements in opposition to the application read:

"I, the undersigned employee of Buntin Reid Paper Division of Domtar Inc., wish to withdraw my name from any petition signed against the union and wish to reaffirm my application for membership in the Office and Professional Employees International Union, Local 343."

5. The Board has consistently held that where statements in opposition to a termination application and in support of continued representation by the trade union



are filed before the terminal date in an application under section 57 they are evidence of employee wishes and must be taken into account in determining under section 57(4) whether not less than forty-five per cent of those in the bargaining unit have signified in writing that they no longer wish to be represented by the trade union. In these circumstances, the Board is governed by the last statement in time of those who have voluntarily signed both a statement against continued representation by the trade union and a statement of reaffirmation of support for the trade union. (See *Browning-Ferris Industries*, [1982] OLRB Rep. June 816 and the cases referred to therein.)

6. In this case the employees seeking to terminate bargaining rights circulated a statement in late January, 1983. It was circulated in order to test employee support for the termination of the respondent's bargaining rights. It was not filed in support of the application. However, the applicant, satisfied with the response, circulated the statements which were filed in support of the application in the period February 23 to March 3, 1983. The statements of reaffirmation of support for the trade union were signed in the period February 17 to March 18, 1983. In the face of the overlapping time frames within which the statements in support of the termination of the union's bargaining rights and the statements opposed to the termination of the union's bargaining rights were signed, the Board checked to see which of the two statements of the two employees who signed both for and against the termination was the last statement in time. In the case of one of these employees, the statement in support of the termination of the union's bargaining rights was signed some 12 days after the statement of reaffirmation of support for the trade union. In the case of the other employee, the two statements were signed on the same day. In these circumstances, we are satisfied that not less than forty-five per cent of the employees in the bargaining unit have voluntarily signified in writing prior to the terminal date that they no longer wish to be represented by the trade union. Accordingly, pursuant to the statutory direction contained in section 57(3) of the Act, we hereby direct that a representation vote be taken amongst those in the bargaining unit. Those eligible to vote are all employees of Buntin Reid Paper (Division of Domtar Inc.) in the bargaining unit, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

7. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Buntin Reid Paper (Division of Domtar Inc.).

8. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. Without getting into a discussion on how this Board will use the "last voluntary statement in time" rule to order a vote in a certification application, and then use the same rule to dismiss an application for termination, I will concur with Alternate Chairman Mr. K. Burkett.

2. My approach to the problem remains as expressed in *Frito-Lay Canada Ltd.* [1981] OLRB Rep 538 (May).

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**1530-82-U Kazimir Cigan, Complainant, v. International Union, United Automobile Aerospace and Agricultural Workers of America, Local 444 and Chrysler Canada Ltd., Windsor, Respondents**

**Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Complaint raising events going back to 1978 – Board exercising discretion not to inquire because of delay**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and C. A. Ballentine.

**APPEARANCES:** *Jeffrey A. Baker and Kazimir Cigan for the complainant; Raymond J. Lebert, Harvey R. Courtland, and Edward Baillargeon for the respondent union; David Deluzio, Lou Bulat, and Arthur Krueger for the respondent company.*

**DECISION OF THE BOARD; April 18, 1983**

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondents contrary to sections 68 and 70 of the *Labour Relations Act*.
2. The complaint, as filed with the Board on November 12, 1982 (by a lawyer other than the complainant's present counsel), alleges, without particularization, that there were "several violations" by the respondents from "1976 to 1978," and states that the "foreman of the second respondent, Chrysler Canada Ltd., physically struck the complainant." The matter was originally scheduled for hearing in Toronto on December 13, 1982, but the location of the hearing was subsequently changed to Windsor. That hearing was rescheduled to February 10, 1983, but was adjourned on the agreement of the parties, including the complainant, who was at that time being represented by yet another lawyer. Thereafter, the matter was scheduled for hearing in Windsor on March 23, 1983 on the agreement of the parties. Less than twenty-four hours before that hearing, the complainant's present counsel served the respondents with a notice of intention to rely upon a lengthy series of events alleged to have occurred between September of 1974 and January of 1978. In view of the fact that those events allegedly occurred over five years before the filing of that notice of intention, the Board found it appropriate to call upon the complainant to show cause why the Board ought to exercise its discretion under section 89 of the *Labour Relations Act* to hear this complaint, as substantially expanded by the notice of intention, after the passage of such a lengthy period of time.
3. In *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, the Board described its approach to delay in cases of this type as follows:

"20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in

a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it – including the employees – are entitled to expect that claims which are not asserted with a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs).)

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay – holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship – quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances



are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

See also *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417; *Concrete Construction Supplies*, [1982] OLRB Rep. Oct. 1446; and *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113.

4. The gist of the complainant's allegations is that various Chrysler Canada Ltd. foremen organized several distinct "campaigns of harassment" against him between September of 1974 and January of 1978, and that the respondent union "failed to take adequate measures to protect [him] from such harassment by arbitrarily dismissing [his] complaints or dealing with [him] in bad faith." The complainant further alleges that as a result of the alleged harassment, and the union's alleged failure to adequately protect him, he "has suffered a nervous breakdown which has resulted in a psychological disability that prevents [him] from maintaining any form of employment whatsoever." The relief sought by the complainant is compensation for all past and future losses of income. Thus, the complaint involves both retrospective and prospective financial liability.

5. The complainant ceased to perform work for the respondent company on April 21, 1978. Although he has not worked for the company since then, he remains an employee and is receiving extended disability payments from the company's insurance carrier pursuant to the applicable collective agreement. The complainant is also receiving two partial disability pensions under the *Workmen's Compensation Act*.

6. In June of 1978, the complainant sought legal advice and thereafter "went through a number of lawyers" with whom he discussed his problems, including difficulties that he was encountering in respect of Workmen's Compensation. During the summer of 1981, the complainant was advised of the possibility of filing a complaint with this Board under section 89 of the Act but no such complaint was filed until October 21, 1981. Under the circumstances, it may be inferred that at least one of the reasons that the complainant was not advised of the availability of Board proceedings before the summer of 1981 is that the primary thrust of his concerns related to Workmen's Compensation and the actions of the company, rather than any alleged failure by the respondent union to properly represent him. In any event, as noted in the *Sheller-Globe* case, *supra*, the respondents are not to be made responsible for any errors or omissions on the part of the complainant's own agents.

7. On October 21, 1981, a complaint was filed with the Board (Board File No. 1559-81-U) by a lawyer other than those previously mentioned. That complaint merely alleged that the respondent union "failed to represent the complainant in the bargaining unit," contrary to what is now section 68 of the Act. It was subsequently withdrawn on November 5, 1981 (with leave of the Board) because it was "incomplete." No explanation whatever has been provided for the period of over a year which elapsed between the withdrawal of that complaint and the filing of the present complaint, which is admittedly based upon the same events that gave rise to the initial complaint. Moreover, the respondents have been prejudiced by the complainant's undue delay in filing and proceeding with his complaint. Records have been destroyed and at least one key witness has died. Other witnesses have retired and moved away. Thus, faulty



recollections, unavailability of witnesses, and disposal of records would hamper a fair hearing at this late date of the issues in dispute, which go back to events which are alleged to have occurred the better part of a decade ago.

8. Accordingly, having regard to all of the relevant circumstances, including the factors set forth in paragraph 22 of the *City of Mississauga* case, *supra*, the Board finds it appropriate to exercise its discretion under section 89 of the *Labour Relations Act* not to inquire into this complaint. The complaint is therefore dismissed.

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**1845-82-R** Alexandra Eadie, Applicant, v. Canadian Union of Public Employees, Respondent, v. **The Doctors Hospital**, Intervener

**Reconsideration - Termination - Prior Board decision finding termination application untimely - Board confirming that appointment of conciliator valid and not affected by Bill 179 - Reconsideration application denied**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and Stewart Cooke.

**DECISION OF THE BOARD;** April 21, 1983

1. This is an application by the intervener employer asking the Board to reconsider its decision of February 4, 1983, (Reported at [1983] OLRB Rep. Feb. 227) in which the Board dismissed the instant application for termination of bargaining rights on the ground that it was untimely. The intervener writes as follows:

February 11, 1983

Mr. D. K. Aynsley,  
Registrar,  
Ontario Labour Relations Board,  
400 University Avenue,  
TORONTO, Ontario  
M5G 1S5

Dear Mr. Aynsley:

Re: Alexandra Eadie and CUPE and the Doctors Hospital  
- Board File No. 1845-82-R

The intervener, The Doctors Hospital, requests that the Board exercise its jurisdiction under s.106(1) to reconsider its decision in this matter. The request is made on two grounds, firstly, the Board has not addressed the threshold question of whether an appointment of a conciliation officer under s.6 had been made. Secondly, the

Board's decision seems to conclude that the parties could still negotiate a Collective Agreement. The intervener submits that in the circumstances this is not so.

With respect to the first issue, the request for conciliation services was made by the Central Negotiating Committee of CUPE, *not* jointly (see paragraph 5, Board's decision), nor by Local 1474, CUPE. The local is the party with whom the Hospital negotiates (see the Consent to Alter Working Conditions and the unexecuted "Local Memorandum"). The Memorandum of Conditions for Joint Bargaining, Paragraph 1, sets out that conciliation services shall be applied for to deal with "central issues only." Thus the request for conciliation was neither made by "a party" nor to "endeavour to effect a collective agreement." The officer was requested, and appointed, to deal only with central issues applicable to all participants, and not to attempt to achieve individual collective agreements. (See also 4th sentence, Paragraph 2, Memorandum of Conditions for Joint Bargaining). Therefore, the officer was not appointed pursuant to s.16 of the Labour Relations Act. The Board's decision seems to assume that since the normal forms and form letters were used, that a normal conciliation appointment had been made.

At the hearing, the hospital had argued that the officer was to deal with central issues only, and thus was not appointed for individual hospitals or agreements under s.16. Alternatively, it was argued, if there had been such an appointment, Bill 179 voided that appointment. The Board's decision seems to address the second argument on the assumption that there was a s.16 appointment; however, there is no indication of the basis on which this assumption is made (see Paragraph 8, Board's decision).

The intervener respectfully submits that the Board should reconsider its decision to determine whether an officer had been appointed under s.16.

The second ground on which this request for reconsideration is made arises from the apparent view of the Board that a collective agreement can be achieved.

At the hearing, held 31 January, the Central Memorandum of Settlement was referred to, but could not be entered in evidence since it was not ratified by the Participating Hospitals and the Participating Local Unions until 4 February. A copy of that Memorandum is now enclosed.

The Board will note that the preamble of the Memorandum provides that the terms of settlement are for "extending the collective agreements in their present form." It will be recalled that there was

no dispute that a first collective agreement covering the clerical bargaining unit at The Doctors Hospital has not been achieved.

The concept of extending only existing collective agreements is repeated in Paragraph 1. Paragraph 2 provides for a 9% increase to "the classification wage rates *contained in the collective agreements*" (emphasis added). Paragraphs 4 through 7 deal with local issue bargaining (see paragraph 4 of the Board's decision regarding what issues *cannot* be dealt with locally). Paragraph 9 of the Memorandum recites that *all* issues except the wage increase are withdrawn.

With the settlement, the "appointment" of the conciliation officer ceases. However, also with this settlement, no collective agreement can be achieved at The Doctors Hospital to cover the clerical bargaining unit while it remains a participant in Central Bargaining.

The Local Union and the Hospital cannot conclude a collective agreement. Arbitration under s.4 of the Hospital Labour Disputes Arbitration Act is not available to the parties because that section first requires the Minister to inform the parties that an officer has been unable to effect a collective agreement.

As set out above, a conciliation officer was not appointed under s.16, Labour Relations Act, to endeavour to effect a collective agreement. Alternatively, if the Board decides that there was a s.16 appointment, that appointment ceased upon the reaching of a settlement. Thus the Minister could not report to the parties as required under s.4 H.L.D.A.

The only access to arbitration to deal with the issues necessary to conclude a first agreement would arise if the union were to withdraw the clerical unit from the restrictions of central bargaining, and go through the complete negotiation and conciliation process. The consequence of that action is obvious.

Finally, although this may be a matter within the sole jurisdiction of the Inflation Restraint Board, this bargaining unit may be excluded from being covered by the Central Bargaining and Settlement. The settlement provides for a 9% increase in wages. As your Board has said in paragraph 12 of its decision, the parties may be able to negotiate compensation increases up to 5% in a first contract situation. The conflict between the statute and the only substantive issue dealt with in the Central Settlement may be such that this bargaining unit is excluded from the Central Bargaining process.

The intervener requests the Board reconsider its decision in light of the above.

The intervener does not require the Board to reconvene a hearing; however, there is no objection to that procedure if the Board deems it advisable.

All of which is respectfully submitted,

*"Brian R. Gatien"*

Brian R. Gatien  
Counsel for the Intervener,  
The Doctors Hospital

2. The power of the Board under section 106(1) of the *Labour Relations Act* to reconsider one of its decisions is clearly a discretionary one, and the Board has always been careful to confine the exercise of that discretion within narrow limits. As the Board commented, e.g., in *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320, at paragraph 11:

11. Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence ... or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously. (*International Nickel Co. of Canada Ltd.*, [1963] OLRB Rep. 234, 64 CLLC ¶15,493 (Ont. H.C.); *Detroit River Construction Case* (1962) CLLC ¶16,260). Both legs of this principle depend upon the applicant having been diligent and therefore having had no opportunity to draw the Board's attention to the object of its concern.

Neither does it enhance the administration and adjudication of labour relations disputes for the Board to embark upon a further inquiry and deliver an elaboration of reasons subsequent to a final decision simply because an unsuccessful party wishes to re-argue its case. Out of regard, however, for the novel issues which arose before the Board in these proceedings, the Board has felt it appropriate to elicit the comments of the applicant and respondent to the intervener's letter, and to now respond briefly to the main points which that letter contains.

3. Only two issues affected the Board's conclusion in its original decision: had a conciliation officer been appointed with respect to this bargaining unit, and (assuming that it would make a difference) had such an appointment been subsequently voided or terminated?

4. To facilitate the process of joint bargaining, it is normal for conciliation services under the *Labour Relations Act* to be applied for on a joint or at least uniform basis for all bargaining units participating in the process. The "Memorandum of Conditions for Joint Bargaining" made clear that this was to occur in the present case as well. The parties making up those bargaining units were referred to in the heading of the Memorandum as:



CANADIAN UNION OF PUBLIC EMPLOYEES On its own behalf  
and on behalf of each of its Local Unions listed in Appendix "A"

(hereinafter called the Union)

-and-

THE PARTICIPATING HOSPITALS  
listed in Appendix "B"

(hereinafter called the "Hospitals").

For a more complete description of the actual bargaining units affected, reference was had, as shown, to Appendices "A" and "B" of the Memorandum. Having regard to those Appendices, there was, and could be, no dispute but that *both* the service and clerical units at Toronto Doctors Hospital were included in this joint bargaining structure. Conciliation services were applied for and granted, by the terms of the Ministry's letter, for:

"The Participating Hospitals; and Canadian Union of Public Employees on its own behalf and on behalf of each of its Local Unions."

There was no evidence before the Board to suggest that the group of bargaining units referred to in that letter was any different than those which the same words were used to describe in the Memorandum of Conditions for Joint Bargaining under which that very application for conciliation was made. But the intervener argues further that the appointment of Mr. Kean as conciliation officer was, notwithstanding the Ministry's use of the "normal forms and form letters," not an appointment of a conciliation officer under section 16 of the *Labour Relations Act*. But if it wasn't that, what was it? The intervener points to no other section in the Act giving the Minister the authority to do what he did, and on the facts before it the Board finds this argument to be without foundation.

5. Was the appointment of the conciliation officer, as it affected the clerical bargaining unit at The Doctors Hospital, subsequently voided or terminated by virtue of *Bill 179*? The Board found that it was not. This finding was in no way dependent upon the signing of a subsequent Memorandum of Settlement, or the consummation of a collective agreement. That would raise a different issue of timeliness, and one which the Board did not have to address, since no party by the end of the hearing was maintaining the position that a collective agreement for this unit had been reached. Neither did the Board purport to deal on its own with the level of compensation available in the circumstances of this particular unit under the terms of the *Inflation Restraint Act*. The observation which the Board made with respect to the wording of sections 12(1)(c) and (d) only noted one more in the series of distinctions which that Act draws between "renewal" and "first agreement" situations, in articulating the contrasting conclusions which the Board arrived at (in comparison with *Broadway Manor Nursing Home*, etc.) as to the impact of the Act on these two distinct situations.

The interpretation of the recently signed Memorandum of Settlement (submitted after the hearing and Board decision), and its applicability or otherwise to the bargaining unit in question, are matters for the parties themselves to address. The only point of relevance to the Board for purposes of the present application was the recognition that the issues designated as "central" while the joint bargaining structure was in place would obviously have to be disposed of one way or another (i.e., through the process of central bargaining or after its expiry) before a collective agreement for the unit in question could be reached. And for that purpose the Board found that the appointment of the conciliation officer on September 29, 1982, for this particular unit, could not be said to have been frustrated or otherwise voided by the enactment of Bill 179.

6. The intervener, subsequent to its request for reconsideration, also placed before the Board a further piece of evidence in this latter regard, in the form of a letter from the Ministry of Labour dated February 7, 1983, which reads:

File No. 82-1355

February 7th, 1983

Ontario Hospital Association,  
150 Ferrand Drive,  
Don Mills, Ontario.  
M3C 3E5

*Attention: Mr. Allan Shakes*

Re: The Participating Hospitals; and Canadian Union of Public  
Employees on its own behalf and on behalf of each of its Local  
Unions

Dear Sir:

By letter of September 29th, 1982, the parties were advised that the Minister of Labour had appointed Mr. F. Kean as Conciliation Officer in the above matter.

This same letter noted that Bill 179 had been introduced and, if enacted, might affect the rights and obligations of the parties under *the Labour Relations Act* and in particular, the continuation of conciliation proceedings.

As you know, on December 15, 1982 the *Inflation Restraint Act* received Royal Assent. The effect of this act is to continue collective agreements for the duration of the restraint program, subject to the allowable increases in compensation rates specified in the Act. By the operation of the *Inflation Restraint Act*, it would appear that a collective agreement is now in effect between the above parties and, therefore, no legal basis exists for continuing this conciliation proceeding. Accordingly, the Minister has directed

me to advise you that, subject to any valid arguments which may be made, he has decided to revoke the officer's appointment.

I would refer you to the provisions of the Act itself to ascertain the precise effect of the restraint program on this bargaining relationship.

Yours Very Truly

"Thomas E. Armstrong"

T.E. Armstrong, Q.C.  
Deputy Minister

This letter does not, in itself, purport to take any action with respect to the continuance of conciliation under the *Labour Relations Act*. It merely signals the Ministry's broad intentions in that regard, in assessing the impact of the *Inflation Restraint Act*, "subject to any valid arguments which may be made." Neither does the Ministry in the letter purport to turn its mind specifically to the situation of a newly-certified bargaining unit such as the clerical unit at Toronto Doctors Hospital; rather, it appears by its reference to contract extension to have been directing its attention to the type of "renewal" situation considered by the Board in *Broadway Manor*, and which formed the great majority of the units participating in the instant joint-bargaining process. The Board does not find that this letter from the Ministry would cause it to alter either of the material conclusions which it arrived at in rendering its original decision.

7. The request for reconsideration is dismissed.
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**1792-82-U** The Canadian Union of Public Employees, Local 1474, Complainant, v. **The Doctors Hospital**, Respondent

Change in Working Conditions – Hospital Labour Disputes Arbitration Act – Practice and Procedure – Unfair Labour Practice – Collective agreement continued in force by operation of *Inflation Restraint Act* – Freeze provision not taking effect where collective agreement in force – Complaint alleging freeze violation dismissed

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members B. K. Lee and I. M. Stamp.

**APPEARANCES:** G. Brian Atkinson, George Maingot and L. Hipson for the complainant; C. G. Riggs, G. F. Luborsky, P. A. Biggin and G. C. Sanchez for the respondent.

**DECISION OF THE BOARD;** April 28, 1983

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging that the respondent has violated section 79 of that Act. While section 89 of the *Labour Relations Act* is the one under which this complaint should be filed, the parties agree that the complaint is with respect to an alleged violation of the section 13 of *The Hospital Labour Disputes Arbitration Act*. That section provides as follows:

Notwithstanding subsection 1 of section 79 of the *Labour Relations Act*, where notice has been given under section 14 or 53 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and *no collective agreement is in operation*, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

(emphasis added)

• • •

3. At the hearing scheduled for the complaint, the Board issued an oral ruling with respect to a preliminary objection and dismissed the complaint. In their submissions on the preliminary issue, the parties referred the Board to sections 9, 11, 13 and 15 of *Bill 179* and, while the Board did not recite the text of those sections in its oral ruling, it is useful to set them out herein and they state as follows:

9. Every compensation plan that, but for this section, would have expired before the 1st day of October, 1982, shall be extended,



- (a) where the compensation plan would have expired on or after the 1st day of October, 1981, for the twelve-month period immediately following the day the plan would have expired; and
- (b) where the compensation plan would have expired before the 1st day of October, 1981, for the period commencing with the day immediately following the day the plan would have expired and ending with the day immediately preceding the plan's anniversary date next following the 1st day of October, 1982.

11. Every compensation plan that is in effect on the 21st day of September, 1982, to which this Part applies and that expires on or after the 1st day of October, 1982, including every compensation plan extended under section 9, shall,

- (a) where the expiry date is scheduled to occur on or after the 1st day of October, 1982 and prior to the 1st day of October, 1983, be extended for the twelve-month period immediately following the scheduled expiry date; and
- (b) where the expiry date is scheduled to occur on or after the 1st day of October, 1983, be subject to this Part for the twelve-month period commencing with the plan's anniversary date falling within the period beginning with the 2nd day of October, 1982 and ending with the 1st day of October, 1983.

13. Notwithstanding any other Act except the *Human Rights Code, 1981* and section 33 of the *Employment Standards Act*, but subject to section 14, the terms and conditions of,

- (a) every compensation plan that is extended or made subject to this Part under section 9 or 11; and
- (b) every collective agreement that includes such a compensation plan,

shall, subject to this Part, continue in force without change for the period for which the compensation plan is extended or made subject to this Part.

15. The parties to a collective agreement that includes a compensation plan that is extended under section 11 may, by agreement, amend any terms and conditions of the collective agreement other than compensation rates or other terms and conditions of the compensation plan.

The Board's ruling, which it hereby confirms, was as follows:

The issue before the Board raised by way of preliminary objection by the respondent relates to the Board determining whether, at the

time giving rise to the complaint herein, the parties were bound by a collective agreement.

The parties were agreed that: they had been bound to a collective agreement with a stated term of September 29, 1980 to September 28th, 1982; on June 29th, 1982, the respondent received from the applicant notice to bargain a renewal of the agreement; and that the parties are subject to the *Inflation Restraint Act*, 1982, S.O. 1982, c.55 (*Bill 179*). The Board assumes that the parties consider themselves subject to *Bill 179* because the respondent is a hospital pursuant to section 6(1)(d) of *Bill 179*.

If there was in law no collective agreement in operation, but rather the terms and conditions of the relationship between the parties were preserved pursuant to section 13 of *The Hospital Labour Disputes Arbitration Act*, which for our purposes is the same as section 79 of the *Labour Relations Act*, this Board would inquire into the complaint. However, if there was, in law, a collective agreement in existence between the parties at the relevant times, the conditions precedent for the application of section 13 of *The Hospital Labour Disputes Arbitration Act* would not be satisfied.

Having regard to section 13 of *Bill 179* which, in our view, continues in force collective agreements which contain compensation plans extended by section 9 of *Bill 179*, and since the compensation plan in question here has been extended by virtue of section 9(a) of *Bill 179*, we must conclude that there was by operation of law a collective agreement in force between the parties at the relevant times. See the Board's decision in *Broadway Manor Nursing Home*, [1983] OLRB Rep. Jan. 26.

We cannot accept the complainant's argument that section 15 of *Bill 179* envisages that the statutory freeze provisions of section 13 of *The Hospital Labour Disputes Arbitration Act* are applicable to the facts of this case because we find that *Bill 179* suspends the right to resort to conciliation or interest arbitration under *The Hospital Labour Disputes Arbitration Act*. See paragraph 30 of the *Broadway Manor* decision, *supra*.

In any event, we are of the view that the statutory freeze provision is not part of the statutory mechanism for resolving collective bargaining disputes. That is, it is not part of the conciliation, mediation and interest arbitration scheme established by the Legislature. Rather the freeze exists in order to preserve the parties' rights when the operation of a collective agreement has ended, but they have not yet exhausted the disputes resolution process under the relevant statute.

For these reasons, the Board sustains the respondent's preliminary objection and dismisses the complaint.

### ORAL RULING OF BOARD MEMBER B. K. LEE;

While I concur with my colleagues, in so doing I adopt the comments of Board Member B. L. Armstrong's dissent in the *Broadway Manor* decision, *supra*, where in major part he states: "... , I am reluctantly driven to the same conclusion as my colleagues as to the meaning of the *Inflation Restraint Act* and its impact on collective bargaining. The language of section 13, when read together with sections 15 and 14 has forced this Board to find that the *Inflation Restraint Act* has not only purported to reduce compensation but has suspended collective bargaining for all of those employees and their unions who have been, or who might be, by government fiat, swept under its coverage."

4. For the foregoing reasons, this complaint is dismissed.

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**0018-82-M** The Ontario Erectors Association, Ralph M. Moore Industrial Installations Limited and **Dominion Bridge Company Limited**, Applicants, v. International Association of Bridge Structural and Ornamental Ironworkers Local 786, International Association of Bridge Structural and Ornamental Ironworkers, the Ironworkers District Council of Ontario, those persons listed on Schedule A and V. Boulard, Respondents

**Construction Industry Grievance – Damages – Strike – Union job Steward instigating unlawful strike in breach of Act and no-strike clause – Union liable in damages for official's conduct – Board assessing quantum**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members M. Eayers and C. A. Ballentine.

**APPEARANCES:** *Robin B. Cumine, Q.C., D. Boulanger and R. A. Speight for the applicants; Maurice A. Green and Gordon Verdecchia for the International Association of Bridge Structural and Ornamental Ironworkers Local 786, and those persons listed on Schedule A; Glen Whyte for the International Association of Bridge Structural and Ornamental Ironworkers, the Ironworkers District Council of Ontario; Mary Cornish and V. Boulard for V. Boulard.*

### **DECISION OF THE BOARD; April 21, 1983**

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board pursuant to section 124 of the *Labour Relations Act* for final and binding arbitration.
2. Schedule "A" to the referral names some 54 persons who are alleged to be employees either of the applicant Ralph M. Moore Industrial Installations Limited

("Moore") or the applicant Dominion Bridge Company Limited ("Dominion Bridge"). During the course of representations on some preliminary issues, the applicants sought to withdraw the complaint against the International Association of Bridge, Structural and Ornamental Ironworkers ("the International") and the Ironworkers District Council of Ontario ("the Council"). For reasons given orally in the hearing, the Board dismissed the referral with respect to those two respondents and it hereby confirms that decision.

3. The applicant Ontario Erectors Association ("the Association") is the designated employer bargaining agency for the employers of journeymen and apprentice ironworkers employed in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario for whom the International and its affiliated bargaining agents hold bargaining rights. Moore and Dominion Bridge are employers represented by the Association and are bound to the provincial agreement ("the Agreement") between it and the International and the Council which was in effect from May 1, 1980 to April 30, 1982. The applicants' grievance alleges that Local 786, one Victor Boulard and the persons named on Schedule "A" engaged in an unlawful strike on March 12th, 1982 in violation of Article 26 (No Strike or Lockout) of the Agreement. The grievance alleges further that the strike was at the instance, direction and encouragement of Boulard, a job steward. The relief sought by the applicants includes a request for damages against each of the respondents for the monetary damage suffered by Moore and Dominion Bridge as a consequence of the strike.

4. During representations on certain preliminary matters it came to light that, through inadvertance, Boulard's name was omitted from the style of cause of the referral, including Schedule "A", although the letter from the solicitors for the applicants dated March 25, 1982 which initiated the grievance was addressed to Boulard as well as to the union parties named as respondents. At the request of counsel for the applicants, unopposed, the Board made Boulard a respondent to the referral, subject to the ultimate disposition of a preliminary objection referred to below with respect to whether individual employees are proper respondents to a grievance.

5. This referral was made on April 2nd, 1982 and was first scheduled for hearing on April 20th, 1982. The Board consented to adjourn that hearing and re-scheduled it for June 25th, 1982, on the agreement of the parties made prior to the hearing. On April 28th, 1982, Local 786 referred a grievance against Moore to the Board on behalf of Boulard (Board File No. 0220-82-M). Because of a potential conflict of interest for the solicitors for Local 786 with respect to that grievance and the instant one, separate counsel was retained on June 4th to act for Boulard in the instant referral and for Local 786 with respect to the grievance referral in Board File No. 0220-82-M. Counsel for Boulard appeared at a hearing into that matter on June 7th, 1982 and succeeded in getting the Board to adjourn it until June 25th.

6. The two referrals were listed for hearing together on June 25th and when they came on for hearing, counsel herein for Boulard was unable to attend and had been unsuccessful in gaining consent for an adjournment prior to the hearing. Consequently, counsel for Local 786 in the instant matter requested adjournment of both referrals on behalf of Local 786 because the local's counsel with respect to Board File No. 0220-82-M was unable to attend the hearing and on behalf of Boulard because he had been unable to engage alternate counsel to act for him in the instant referral.



The Board heard and considered the representations of the parties on the request for adjournment and on the further preliminary issue of whether the Board should consolidate both referrals for the purpose of the hearing. The parties acknowledged, with respect to this latter issue, that the issues in the two referrals were different, although some of the evidence might be common to both. The Board refused to consent to an adjournment of the hearing into the instant referral because Boulard had had reasonable time in all of the circumstances to engage competent counsel. The Board also declined to consolidate the two referrals because of the common view of the parties that they involved different issues. Should, however, the applicant and respondent in Board File No. 0220-82-M agree, evidence in the instant referral relevant to the other one could be applied to it.

7. Accordingly, the Board adjourned the hearing into the Board File No. 0220-82-M and proceeded with the hearing into this referral, continuing it for two further days, September 14th and 15th. Boulard acted for himself on June 25th and was represented by counsel on September 14th and 15th. The grievance in Board File No. 0220-82-M was heard on October 15th and November 23rd, 1982.

8. Counsel for Local 786 raised a further preliminary objection at the June 25th hearing. He contended that Boulard and the persons listed on Schedule "A" were not proper respondents to the referral of a grievance under section 124 of the Act. The Board heard the representations of the parties on this issue and the related one of whether Boulard and the employees named on Schedule "A" could be made liable in damages should any be assessed by the Board. The Board reserved its decision subject to the parties having the opportunity to make additional representations later in the proceedings.

9. The Board heard the testimony of 13 witnesses and the findings of fact herein have been made after taking into account the consistency of each witness' evidence, their ability to recall the events about which they were testifying, the firmness of their memories, their ability to resist the influence of self-interest to modify their recollections, their ability to express their recollections clearly and their demeanor. On the basis of those criteria, the Board does not rely on the evidence of Victor Boulard except to the extent it was corroborated by another witness or other witnesses.

10. Moore and Dominion Bridge are contractors to E. B. Eddy Forest Products Limited on the modernization and expansion of its pulp mill at Espanola, Ontario. Moore was working on the assembly and installation of a lime burning kiln and employed three ironworkers on that job, including Boulard, at times material to this referral. Dominion Bridge had contracts for the supply and erection of structural steel on the No. 3 boiler recovery building and for a new pulp machine. They are two of at least four contractors on the project which employ ironworkers, the other two being "Noront Steel" and "Comstock." As the Board stated above, Moore and Dominion Bridge were bound to the Agreement. So is Local 786 and it can be inferred readily from the evidence that Noront and Comstock were bound to it also with respect to the ironworkers employed by them on the E. B. Eddy project. Article 26 - No Strike or Lockout states as follows:

No employees bound by this Agreement shall strike, and no Employer bound by this Agreement shall lockout his employees.

11. Boulard had worked on the project as a foreman for Comstock for some six months until he was laid off on March 9th, 1982. He was hired by Moore as a welder on Wednesday, March 10th having been referred by Local 786 in response to a name request by Omer Vondette, Moore's ironworker foreman. Boulard had approached Vondette on March 9th about being hired by Moore. Boulard became steward for Moore's ironworkers immediately upon reporting for work on March 10th. He started working with a third ironworker, Roland Dallaire, already employed by Moore and early in his shift he discovered that two millwrights whom he knew were working on aligning the kiln, work which he concluded came within the trade jurisdiction claimed by the ironworkers.

12. Boulard went immediately to Moore's office trailer and introduced himself as ironworker job steward to Ernest Davidson, project manager for Moore. Davidson explained the assignment of the work of aligning the kiln to the millwrights as being in accordance with an agreement between the international trade union parents of the two trades. Boulard was not satisfied with the explanation and, in Davidson's presence, telephoned Jim Lajeunesse, President of Local 786. Lajeunesse told Boulard that he or Gordon Verdecchia, business manager for the local, would come to the project the next day and look at the work.

13. Verdecchia, who has been business manager of Local 786 for seven years, came to the site at 2:30 p.m. on March 11th. He first went alone to look at the work at issue and then he discussed with Davidson in Boulard's presence the basis for the work assignment to the millwrights; confirmed with Denis Boulanger, a vice-president of Moore, that the work was the same as had been assigned to the millwrights on another job within Local 786's territory and informed Boulard, after discussing it with him, that the work was properly assigned. Boulard disagreed with Verdecchia and they went together to the kiln. They met two Noront Steel employees there who were told by Verdecchia that ironworkers would not be aligning the kiln, whereupon an argument erupted. Verdecchia gave the two Noront ironworkers a copy of the ironworkers-/millwrights agreement on which he had based his decision. He had given a copy previously to Boulard and Dallaire. Verdecchia left the project without altering his decision that the work in question was not going to be done by ironworkers.

14. Boulard came to work Friday morning, March 12th, but did not work. He went at approximately 8:10 a.m. to Moore's office trailer to speak to Davidson. He was on the job, so Boulard left a message with Paul Merrill, Moore's project superintendent and Robert Hilts, the timekeeper that he and Dallaire had "wobbled" the job because the millwrights had been doing ironworkers' work. Boulard returned at 8:35 and repeated to Davidson what he had said to Merrill and Hilts and stated that he would do it again on Monday if the millwrights had done any more of the ironworkers' work. Within 10 minutes the ironworkers employed by Dominion Bridge started coming down from the steel which they were raising. Within approximately 30 minutes Moore's three ironworkers, four or five ironworkers employed by each of Noront Steel and Comstock and all of Dominion Bridge's ironworkers except for two job stewards, seven foremen and a five-man raising crew which was finishing unloading a truckload of steel, had left the job. By 9:30 a.m. all of the ironworkers had left the site. Dominion Bridge employed approximately 65 of them, including the foremen. Approximately 10 were members of Local 786, the rest were from out of town. There were approximately 15

Local 786 members employed on the project plus approximately 10 permit card workers. The remainder were working out of Local 786 on travel cards from other ironworkers' locals.

15. Dominion Bridge's ironworkers had started work at 7:30 a.m. and Clyde Fitzgerald, site superintendent for Dominion Bridge, first learned of his men starting to leave the job at approximately 8:45 when John Powers, chief steward and Al McNeil, job steward for the ironworkers employed by Dominion Bridge, came to his office. Powers told him that the ironworkers employed by Moore and the other companies had walked out, and Dominion Bridge's ironworkers may go too.

16. Powers has worked off and on for Dominion Bridge for some 30 years and has been a steward on nearly every job on which he has worked for the company. He heard at lunch on March 11th from a Noront ironworker about a possible dispute about work on the kiln and he was aware by the end of the day that the ironworkers working for Moore, Noront and Comstock disagreed with the assignment of the kiln alignment work to millwrights. He knew that Boulard was steward for Moore's ironworkers and was upset by the work assignment. Powers made no attempt to advise Verdecchia or Lajeunesse of the situation. Powers was working on the "star" raising gang on the boiler recovery building on Friday morning when his connectors, who were up on the steel, told him some ironworkers were leaving the site. They were passing right by his crew's crane and when Powers spoke to them they told him that they disagreed with Verdecchia about the work assignment on the kiln. Boulard was amongst the ironworkers leaving the site and when Powers spoke to him, Boulard stated that he disagreed with Verdecchia's decision that the kiln alignment was not ironworkers' work. While Powers had not spoken to Boulard about the kiln work before, it was his understanding that it was Boulard who had brought about the walkout.

17. Powers told his crew to stay put while he looked for McNeil but they left the job and went to their changing rooms. Other Dominion Bridge ironworkers were doing the same. He told them all to wait, that he was going to call Verdecchia. While he and McNeil were at Fitzgerald's office, Powers spoke on the telephone with Lajeunesse who told him to try and keep the men on the site and he would come down immediately from Sudbury. He relayed this instruction to about 35 men waiting in three changing rooms then went onto the site with Jim Toms, General Structural Superintendent for Dominion Bridge. The raising gangs were in the process of securing their rigging preparatory to leaving the job. Toms and Powers tried unsuccessfully to get them to stay on the job. According to Powers, most of these men merely responded that they were from out of town and "were going home." As Powers explained to the Board when you are working in another local's territory and the local members go off the job, if you want to work there again, you go with them. He explained his understanding that Boulard had started the walkout in similar terms: "You've got to understand the trade. When you see your fellow members going out, you've got to go with them."

18. James Phair, general organizer for the Ironworkers in Canada, was summoned to testify in reply for the applicants. He told the Board that he had been assigned by the International office to investigate charges that Boulard had shut down Dominion Bridge's jobs on the E. B. Eddy project. He made an investigation during which Boulard admitted to Phair that he had been involved in taking the ironworkers



off the E. B. Eddy job; that he had gone around the site to where contractors other than Moore were working in order to take their ironworkers off the job; and that he had encountered two stewards on his way off the job on March 12th and had asked for their support. Boulard had denied in his testimony that he had done any of these things but, for the reasons given earlier, the Board is not prepared to rely on his evidence.

19. Boulard has been a member of Local 786 since 1967, has been a steward before and served for four years as a member of its executive board. He was well known to members of Local 786 on the project; they knew that he was steward for ironworkers employed for Moore; and Powers, McNeil and Boulard acknowledged that Boulard is the person to whom they would look to represent their interests with respect to the work on the kiln, or for information about it. There had been no dispute about the kiln alignment work until Boulard went to work for Moore and questioned its assignment to the millwrights.

20. Article 26 of the Agreement makes it an offence for employees bound by it to strike. It does not define a strike and nor is strike defined elsewhere in the Agreement. Clause (o) of section 1(1) of the Act gives the following definition:

“strike: includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

Furthermore, section 72(1) of the Act expressly prohibits strikes and lockouts during the term of a collective agreement:

Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee; and

section 74 prohibits a trade union from, *inter alia*, calling or authorizing a strike or its officers or agents from counselling, procuring, supporting or encouraging an unlawful strike:

No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

21. The definition of strike in clause (o) of section 1(1) establishes two key elements for employees' actions to constitute a strike: there must be an actual or threatened disruption of the employer's operation and the employees must have acted in concert. See *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569, at paragraph 12. The facts leave no doubt here, nor was it contested, that the operations of Moore and Dominion Bridge were disrupted on March 12th. The facts also satisfy the Board that the employees acted in concert to cause that disruption. Boulard, a job steward for Local



786 who was known to its members to be such and a person to whom they would look for leadership on the work assignment issue, an issue which had become known at least to some of the ironworkers employed by other contractors on the E. B. Eddy project, was actively involved in taking the ironworkers off the job. A fact admitted by him to a senior officer of his union.

22. Absent that admission, the Board would still find that the employees acted in concert. There is no credible or convincing explanation for the ironworkers employed by Moore and Dominion Bridge in particular, or for those employed by the other contractors, Noront Steel and Comstock, for leaving their jobs on Friday, March 12th. The Board, therefore, draws the inference that they have acted in concert and that their actions constitute a strike. That strike having occurred during the term of the Agreement is a violation of section 72 of the Act and Article 26 of the Agreement.

23. The applicants are seeking relief, *inter alia*, in the form of damages payable to Moore and Dominion Bridge for monetary damages suffered by reason of the breach of Article 26 of the Agreement. In view of the preliminary issue of whether Boulard and the other persons named as respondents to the referral are proper parties, the Board will deal first with the question of whether Local 786 would be liable in damages if there are damages arising out of the unlawful strike.

24. While the preponderance of arbitration awards dealing with a trade union's liability for damages arising out of an unlawful strike long have held that clauses similar to Article 26 do not impose an absolute liability on a union, it is well settled that a union, under such a clause, may be made vicariously liable in damages by the conduct of its officers and officials where the clause has been breached. In respect of liability arising out of the conduct of stewards, Prof. Bora Laskin, as he then was, stated as follows in one of the leading cases, *Polymer Corp. Ltd.* (1958), 10 LAC 31 (Laskin), p. 39:

Stewards or committeemen who are put forward by a union as its representatives for departmental or area grievance adjustment must be expected to know that their very status and function underlines the impropriety as well as the illegality of a strike while the collective agreement is in force. Thus it follows that a strike called or instigated by a steward or committeeman in his area is a strike for which the union must accept liability under art. 8.01. Steward action is union action in this respect.

25. Article 23 of the Agreement, which states in major part as set out below, leaves no doubt that an Ironworkers' job steward represents the interests of the union and its members under the Agreement.

There shall be a steward appointed by the Business Agent, on each job at all times during assigned working hours and all overtime hours, who shall be a Local Union member in good standing.... The Steward shall be given reasonable time during his shift to fulfill his duties and obligations. The Job Steward shall be notified when overtime is to be worked. The Steward shall keep a record of

employees hired, laid off and discharged, and shall take up all grievances on the job and try to have same adjusted. In the event he cannot adjust them, he must promptly report that fact to the Business Agent of the Local Union so that Step 2 of the grievance procedure can be followed through. He shall see that the provisions of this Agreement are complied with and report the true conditions and facts.... The Employer agrees that when employees are laid off, the Steward shall be notified prior to the lay-offs, and all things being equal, the Steward will be the last man laid off. The Employer further agrees that the Steward will not be transferred to another jobsite unless mutually agreed by the Employer's Representative and the Local Union Business Agent. The Steward shall be a member of the Local Union in whose territory the work is being performed.

26. Those were the contractual obligations bearing on Boulard when he became job steward for Moore's ironworkers. Those are not his only contractual obligations as a steward. He shares with Local 786 an obligation under Article 26 with respect to the prohibition that "No employees bound by this Agreement shall strike, ...". Prof. Laskin in the *Polymer* award, *supra*, having rejected the proposition that provisions of that nature impose an automatic liability on the union whenever its members engaged in an unlawful strike, goes on, at page 34, to define from language of similar meaning as herein the scope of a union's obligation. In so doing, he adopts the interpretation given to similar language by the arbitrator in *Canadian General Electric Co. Ltd.* (1951), 2 LAC (Laskin) and concludes that a reasonable standard of conduct for a union under such language is that it "... will not through its proper officers sanction or direct or condone or encourage stoppages by any person in the bargaining unit."

27. Applying that standard of conduct to the facts before this Board establishes unequivocally that Boulard instigated the unlawful strike of Moore's and Dominion Bridge's ironworker employees on March 12th. Therefore, he has created a clear breach of Article 26 and, being an official and agent of Local 786, has made it liable for the strike. His actions also constitute a breach of the prohibitions in section 74 of the Act.

28. As the Board commented above, even if it did not rely on Phair's evidence that Boulard admitted leading the walkout, it would have found that the employees had acted in concert in walking off the job on March 12th. Similarly, the Board would find that their concerted action was instigated by Boulard.

29. Boulard was already familiar with the E. B. Eddy project when he began to work for Moore on March 10th. He immediately became steward for Moore's ironworkers and raised the issue over assignment of the kiln alignment work. Word of the issue had spread sufficiently so that Powers was aware by the end of March 11th of its existence and of the dissatisfaction of Boulard and some of the ironworkers employed by Noront Steel and Comstock with Verdecchia's ruling that the kiln work at issue was not that of ironworkers. Boulard was known to these men and at least to other members of Local 786 to be the steward for Moore's ironworkers and he, Powers and McNeil acknowledged that Boulard was the person other ironworkers would look to for direction and information about the work assignment issue. Their views are

consistent with the obligations of the steward spelled out in Article 23 of the Agreement. On Friday morning, March 12th, within a half hour of Boulard leaving the job with Dallaire followed by the Noront Steel and Comstock ironworkers, over 50 of Dominion Bridge's ironworkers had laid down their tools and left the site. When Powers intercepted Boulard to find out what was happening, he did not see Boulard doing anything to dissuade the other ironworkers from leaving.

30. Even were the Board to ignore the evidence of Boulard's admission that he led the walkout and that he had been around the site to get other ironworkers to leave the job and the obvious inference to be drawn from that evidence, given the compressed time period in which the entire scenario developed from Boulard's initiation of the work assignment issue on Wednesday morning through to the evacuation of all ironworkers from the site by 9:30 a.m. on Friday and the speed with which all but a small group of ironworkers cleared the site after Boulard was seen leaving, the inescapable conclusion at least is that the other ironworkers who walked off the job were following the example of a steward, Boulard. Therefore Boulard, by his example encouraged the unlawful strike of other ironworkers on the project.

31. There is some additional support for this reading of the facts from the evidence of Lajeunesse and Powers. When Lajeunesse came to the site Friday morning, he was asked by Davidson and by a Mr. Corber, who was in charge of the job for E. B. Eddy, to remove Boulard from the project. He advised against such action because of an expectation that it would create problems for getting the men back on the job on Monday. Powers stated quite candidly that, when you are a member of one local and working in another local's territory, if that local's members walk off the job, you go with them if you want to work there again. That reasoning would be even more compelling when one of the local's stewards is in the vanguard of those walking out.

32. Thus, as a result of Boulard's conduct in instigating the unlawful strike, Local 786 must accept liability for its occurrence. Lajeunesse and Verdecchia acted promptly to limit that liability by taking steps over the weekend to ensure an orderly return to work on Monday. All of the ironworkers for Moore and Dominion Bridge returned to work without further incident on the Monday and there is no evidence of ironworkers for the other contractors being scheduled for work and not working. While Local 786 officials acted promptly, positively and decisively in that respect, the Board has some remaining doubt as to how they discharged their responsibility under Article 26 to prevent the unlawful strike of their members.

33. Verdecchia admits that there was a heated discussion between him and the two Noront Steel ironworkers when he and Boulard went to the kiln together Thursday afternoon. He told the Board that, when he left the project after the encounter, he did not suspect that the work assignment issue would become the cause of an unlawful strike. If he had suspected that to be the likely reaction of his members, he would have stayed in the area to deal with the event, as he claims he had done in circumstances where he thought that precaution was needed. Powers was aware by the end of the same day, Thursday, that Verdecchia had come to the project, that Boulard and some other ironworkers disputed Verdecchia's judgment on the work assignment. But he did not see the need to alert Verdecchia or Lajeunesse to the possibility of that dissatisfaction spreading.



34. While the Board has the advantage of the accuracy of hindsight, the failure of both Verdecchia and Powers to recognize the circumstances with which they were confronted on Thursday as the forerunner of Friday's strike seems inconsistent with their experience as union officials in their trade. Both must be aware that work jurisdiction problems are one of the more common causes of work stoppages on construction sites. When you add to that context Power's graphic description of how members of the trade respond when any of their brothers in the trade walk off the job, their failure to accurately assess the temper of the membership on Thursday raises reasonable doubt as to whether Local 786 officials acted with appropriate diligence to avert the strike. It is unnecessary for the Board to make a finding with respect to Verdecchia's and Power's conduct in this case because of the clear evidence with respect to Boulard's complicity in the strike. Absent such evidence, however, Local 786 might still have been found liable for the strike on the basis of the failure of its officials to properly assess the need for action to avert it.

35. It has become well established since the decision in *Re Polymer Corp. Ltd.* (1959), 10 LAC 51 (Laskin) affirmed 28 D.L.R. (2d) 124, [1964] S.C.R. 338, *sub nom. Imbleau v. Laskin*, that arbitrators have the authority to award damages for proven losses attributable to an unlawful strike. The Board has found Local 786 to be liable for the unlawful strike on Friday, March 12th, 1982 of the ironworkers employed by Moore and Dominion Bridge. Therefore, Local 786 would be liable for losses suffered by those two applicants as a result of the strike and it remains to be determined whether there are damages to be assessed against Local 786.

36. Moore and Dominion Bridge are claiming for certain costs which they contend were incurred as a direct result of the unlawful strike on March 12th. Their claims are summarized below:

<i>Moore</i>	
Indirect (i.e., overhead) costs	\$100.00
Salary for Ernest Davidson for time spent dealing with the strike on March 12th.	250.00
Reporting pay for Omer Vondette, ironworker foreman, for time not worked on March 12th.	31.00
Miscellaneous expenses	50.00
	<u>\$431.00</u>
<i>Dominion Bridge</i>	
Cost of site supervision, site services and equipment operators for March 12th.	\$ 4,800.00
Cost of idle equipment.	3,694.00
Cost of making up for the delay in the construction schedule.	\$13,120.00
	<u>\$21,614.00</u>

In general, both companies are seeking to recover the costs of payments made to employees whose terms of employment required it but who, because of the strike, were unable to perform productive work on March 12th; for the costs of equipment idled by the strike; and for other unrecovered overhead expense. Both companies are working



under fixed-price contracts. Therefore, to the extent that the cost of performing the job would be increased as a result of the strike, the mark-up (or profit) remaining between the estimated cost and the fixed-price of the contract would be reduced. That is the principal basis for their claims. While it would not be possible to determine the cost impact of the strike until the job is finished, and at that time it might be difficult to do it with any precision, the Board finds the general premise of the two employer applicants that the duration of their jobs, therefore their costs, will be extended by one day to be a reasonable one for calculating costs, particularly since the strike was not in any way influenced by any act or omission of the employers. Moore and Dominion Bridge calculated the costs of their claims for these types of expenses on the same basis as they had bid the jobs.

37. The Board, in assessing Moore's claim as summarized above, is not satisfied that the claim for \$250 for Davidson's time spent on the strike is substantiated. Moore has a variety of trades and work on the project for all of which Davidson is responsible. In the Board's view, this circumstance makes the premise that his time on the project would be extended by one day mainly because of the strike sufficiently questionable not to allow that part of Moore's claim. The Board is satisfied on the basis of the evidence which it heard and has considered that the other costs are a reasonable consequence of the strike. The Board finds therefore that Moore has incurred additional costs directly attributable to the unlawful strike as follows:

Indirect (i.e. overhead) costs	\$100.00
Reporting pay for Omer Vondette	31.00
Miscellaneous expenses	50.00
	<u>\$181.00</u>

38. Turning to Dominion Bridge's claim, its only jobs are the two referred to above. Consequently, all of Dominion Bridge's work was halted by the strike and, except as specifically noted hereafter, those employees providing supervision and other site services were idled by the strike. The damages claimed for site supervision, site services and equipment operators are based on the payment to 20 employees of wages and living allowances for the day, a payment required whether or not work was performed. The costs have been estimated on eight hours at an average hourly cost of \$25.00, plus living allowance. Approximately two hours work was performed on March 12th, so the claim is reduced by 25 per cent to \$3,600. The equipment operators are paid for eight hours whether or not there is eight hours work for them. On March 12th, they performed service work on their equipment which they would do ordinarily when it was idled by weather or on overtime. Thus they were not being paid for idle time, which is the justification for this item. Any overtime for which they were paid after the strike is reflected in the claim for the cost of making up for the schedule delay. Therefore, this item should be reduced by a further \$1,600 (8 employees  $\times$  8 hours  $\times$  \$25.00). These costs are further reduced by \$200.00 to delete Dominion Bridge's claim with respect to Malcolm Tike, General Foreman, who performed a full shift of productive work. The allowable costs for this part of the claim are thus \$1,800.00.

39. Dominion Bridge's claim for the costs of idle equipment is based on its daily book costs for owned equipment assigned to their two contracts according to the bid

costs. It is equipment which would ordinarily be rented out or assigned to another project if not in use. There was no opportunity to rent it on the day of the strike and the loss of the shift would ultimately result in delaying the availability of the equipment for use on other projects by one day. The Board is satisfied that this claim reasonably represents the additional equipment cost to Dominion Bridge caused by the strike.

40. It is also claiming for the cost of making up for the delay in the construction schedule resulting from the work time lost on March 12th. That part of its claim constitutes approximately 60 per cent of the total claims of the two companies. Dominion Bridge, on average, was at least one month behind schedule for meeting the projected completion dates for its two contracts. This problem had been caused primarily by weather conditions which had prevented ironworkers from working on the steel. Its most critical deadline was for placing the roof beams on the boiler recovery building. E. B. Eddy had given Dominion Bridge an extension until March 23rd on the completion date. No other contractors scheduled to work on the building could begin their work until at least half of the roof was on. As of March 12th there were only 12 more beams to place before the roofers could begin to roof the first half of the building. March 12th was an exceptionally good day for raising steel and Dominion Bridge expected to get most of the work done by the end of the shift. Toward this end, McNeil's crew, which had been working on the pulp machine, had been moved over to help the raising gangs on the boiler recovery job. Dominion Bridge was employing the maximum number of ironworkers that the job would absorb so, prior to the strike, in order to make up for the time lost previously and to meet their completion dates, they had been working daily overtime when weather permitted and on every other weekend with the ironworkers who wanted the weekend work.

41. Dominion Bridge's claim for \$13,120.00 costs of catching up for the schedule delay caused by the strike is based on the fact that it had been working consistent overtime prior to the strike in order to meet its completion dates and, therefore, it had to make up for the lost day by working 80 employees the equivalent of one eight-hour shift of overtime. It is claiming the additional cost of the overtime calculated at 640 man hours at the average hourly cost of \$20.50. The detailed records for the two contracts reveal that, during the month following the strike, overtime slightly in excess of 640 man hours was worked. The documentary evidence does not specifically connect that overtime to the strike, but the evidence of witnesses was that Dominion Bridge concentrated its efforts on the boiler recovery building and the overtime worked on it between March 15th and 23rd was a direct consequence of the delay caused by the strike and essential to meeting that target date for having the building ready for the roofers. After that it was necessary to put a similar effort into catching up on the balance of their contracts. The company's records of overtime work seem to bear out that evidence and generally supports this part of its damage claims.

42. The Board finds, therefore, that Dominion Bridge has incurred additional costs directly attributable to the unlawful strike as follows:

Cost of site supervision, site services and equipment operators	\$ 1,800.00
Cost of idle equipment	3,694.00
Cost of making up for the delay in the construction schedule	13,120.00
	<u>\$18,614.00</u>

43. Therefore, as a result of the unlawful strike which took place on March 12th, 1982, in violation of Article 26 – No Strike No Lockout of the agreement and having regard for the Board's finding Local 786 would be liable for any damages suffered by Moore and Dominion Bridge as a direct consequence of the strike, Local 786 owes them the following amounts:

Moore	\$ 181.00
Dominion Bridge	18,614.00
	<u>\$18,795.00</u>

44. In view of that result, it is not necessary for the Board to deal with the claim for damages against Boulard and the persons named on Schedule "A", and with the related question of whether they are proper respondents to a referral of a grievance under section 124 of the Act.

45. Having regard to the evidence before the Board, its findings of fact thereon and pursuant to section 124 of the *Labour Relations Act*, the Board determines that:

- (a) the International Association of Bridge, Structural and Ornamental Ironworkers Local 786 ("Local 786") and the Ontario Erectors Association, Ralph M. Moore Industrial Installations Limited ("Moore") and Dominion Bridge Company Limited ("Dominion Bridge") are bound to the provincial agreement ("the Agreement") between The Ontario Erectors Association and The Ironworkers District Council of Ontario and International Association of Bridge Structural and Ornamental Ironworkers Local Unions 700, 721, 736, 759, 765 and 786 which was in effect from May 1st, 1980 to April 30th, 1982;
- (b) Local 786 has violated Article 26 – No Strike or Lockout of the Agreement as a result of an unlawful strike, on March 12th, 1982, of ironworkers employed by Moore and Dominion Bridge and represented by Local 786;
- (c) Local 786 owes to Moore and Dominion Bridge as a result of its violation of the Agreement the sum of \$18,795.00 made up as follows:

Moore	\$ 181.00
Dominion Bridge	18,614.00
	<u>\$18,795.00</u>

and

- (d) Local 786 shall pay forthwith to Moore the sum of \$181.00 and to Dominion Bridge, the sum of \$18,614.00.



**1930-82-R** International Ladies' Garment Workers' Union, Applicant, v. 341857 Ontario Ltd. carrying on business as **Don's Sportswear**, Respondent, v. Group of Employees, Objectors

Adjournment - Charges - Membership Evidence - Board making inquiry although cards subject to allegations not relied on by union - Board finding no wrongdoing by union - Adjournment sought because employer adviser not present denied - Policy re adjournment reviewed

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

***APPEARANCES:** B. Fishbein, H. Stewart and E. Ziemba for the applicant; D. Jane Forbes-Roberts for the respondent; no one appearing for the objectors.*

**DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; April 14, 1983**

1. This is an application for certification.
2. By a decision in this matter dated February 15, 1983, the Board concluded that the statement of desire filed in opposition to the trade union's application was not a voluntary expression of the views of its signatories. The Board then relisted the matter for a continuation hearing to entertain evidence and submissions relating to the respondent employer's charges against the union's membership evidence.
3. The charges against the union's membership evidence relate to two employees, Ms. Nanda Sukhnandan and Ms. Carmella Rossi. Although the union did not file membership cards for these employees, the Board entertained the charges because if proven, and depending on the circumstances, they could taint the reliability of other membership cards.
4. The Board has carefully reviewed the evidence relating to the union's initial approach to Ms. Nanda Sukhnandan and its subsequent attempt to collect the \$1.00 membership fee. Having assessed the quality of the evidence presented and the credibility of the respective witnesses, the Board is compelled to conclude that the union did not engage in wrongdoing or exert undue pressure on Ms. Sukhnandan. Important segments of Ms. Sukhnandan's evidence were internally inconsistent. Her testimony, therefore, does not establish a probable account of what happened. Moreover, her answers were frequently evasive and non-responsive. In contrast, the union's witnesses were forthright in their testimony. The Board was given no cause to doubt the veracity of their evidence.
5. The Board accepts from the evidence that Ms. Sukhnandan willingly signed a membership card when she was first approached by the union. The Board is satisfied that the union representative, Mr. E. Ziemba, did not knowingly or intentionally mislead Ms. Sukhnandan about either his identity or the effect of signing a membership card. The Board has strong reservations about whether Ms. Sukhnandan was in fact confused by his approach, but if she was, we conclude that there was no reasonable basis for it. The Board further accepts that Ms. Sukhnandan willingly sought to find



sufficient change in her purse to pay the membership fee immediately after she signed the card. She even permitted Mr. Ziemba to help her count out her change. When it was clear she did not have the required change, Ms. Sukhnandan and Mr. Ziemba arranged that he would visit her home to collect the money.

6. It is obvious that Ms. Sukhnandan had a change of heart between the time she signed the card and the point when Mr. Ziemba and his associate, Mr. H. Steward, came to her home to collect the \$1.00 membership fee. The Board rejects outright that either union representative threatened Ms. Sukhnandan with the loss of her job if she did not pay the \$1.00. In examination-in-chief Ms. Sukhnandan asserted without apparent reservation that the threat had been made by Mr. Ziemba. In cross-examination she stated that she couldn't recall which of the two union representatives attending at her home had made the threat. If the threat had actually been made the Board would expect, in the circumstances, that Ms. Sukhnandan would have been able to recall which of the two union representatives, both of whom were sitting before her at the hearing, said she would lose her job if she didn't pay the \$1.00. This lapse and the overall inconsistent, non-responsive nature of her testimony, coupled with the credible denials of the two union representatives, satisfy the Board that the union did not threaten Ms. Sukhnandan in an effort to persuade her to pay the \$1.00 membership fee. Further supporting the Board's assessment of the evidence is the improbability of the following: Ms. Sukhnandan's brother testified to having heard the alleged threat. The next day he called the company to ask the owner if he knew that the union was trying to get in. He admits, however, that during his conversation with the owner he did not mention the alleged threats. The strong probability is that if such threats had been made, Ms. Sukhnandan's brother would have mentioned them. The fact that he didn't, supports the Board's conclusion that they were not made. The Board further rejects the suggestion that subsequent to the home visit, Mr. Stewart threatened that he would send Ms. Sukhnandan's card to the employer if she refused to pay the \$1.00.

7. We turn now to Ms. Carmella Rossi. The employer alleges that on a visit to Ms. Rossi's home, Mr. Ziemba threatened some four consecutive times that the union would "remember her and her husband" because she would not sign a card. Having carefully assessed the evidence of the union and the witnesses testifying against the union (Ms. Rossi and her son), we readily conclude that the union did not engage in any wrongdoing. It is unnecessary to review herein all the details of the conversation. The alleged threat, however, simply does not emerge plausibly from Ms. Rossi's own testimony. Moreover, the facts she set out as surrounding the alleged threat are, in a number of important aspects, inconsistent with the testimony of her son. The four union witnesses who were present at the time of the alleged threat, each testified in a convincing and straightforward manner to what was said during the exchange. The Board accepts their uniform denial that anything improper was said.

8. The Board does not consider Ms. Rossi's subsequent threat against Mr. Ziemba which was made at the plant a few days later as probative of the alleged threat against her. The threat she made was, "You give me trouble, someday I'm going to kill you." She confirmed in her testimony that when she said this she said it as a joke.

9. Having regard to the evidence in its entirety the Board is fully satisfied that no threats or undue influence were brought to bear on either Ms. Sukhnandan or Ms. Rossi.

10. For the reasons set out above the Board concludes that the union did not engaged in any wrongdoing in its membership campaign. The Board, therefore, dismisses the charges filed by the employer.

11. In its decision dated February 15, 1983 the Board found, having regard to the agreement of the parties, that all employees of the respondent in Metropolitan Toronto, save and except foreperson, persons above the rank of foreperson, office and sales staff, mechanics, designers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The Board further found in that decision, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on January 26th, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. Moreover, as set out above, the Board concluded in its February 15th decision that the statement of desire filed in opposition to the union's application was not voluntary.

14. In these circumstances and in view of the Board's dismissal of the employer's charges against the union, the Board certifies the union as the exclusive bargaining agent for the employees in the bargaining unit set out above.

15. In closing, the Board records the ruling it made at the outset of its initial continuation hearing into the charges filed by the employer. Counsel for the employer requested that the Board adjourn its hearing because the owner of the respondent was on a golf holiday in Florida. The union would not consent to the adjournment. Counsel for the employer acknowledged that the owner was not required to give evidence. She stated, however, that he was her sole adviser. We note that the employer left for his holiday approximately one week after he had been formally advised of the date set for the continuation of the Board's hearing. Apparently he went, notwithstanding the hearing, because his companions were relying on his presence in the golf tournament. It is said that they would not have been able to enter the tournament if he dropped out.

16. The Board's policy with respect to the granting of adjournments was stated as follows in *Nick Masney Hotels Limited*, [1968] OLRB Rep. Nov. 833 at pp. 834-835:

... [T]he Board's practice [is] to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party, e.g., where it is proven that a witness essential to the party's case is unable to attend because of serious illness. It has not been the practice of the Board to grant adjournments merely for the convenience of counsel, as was the basis of the request in this case.

The Board's refusal to grant an adjournment in *Nick Masney* was upheld on appeal by the Court of Appeal of Ontario. In *Regina v. O.L.R.V., ex parte Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461 the Court endorsed the Board's adjournment policy and made the following observations concerning the need for expedition, particularly in certification proceedings. At pp. 465-466 Laskin J.A., speaking in the Court said,

This Court cannot say, as Addy, J., could not say, that the refusal of an adjournment to the employer in the present case amounted to a denial of natural justice. The Ontario Labour Relations Board deals in certification matters with fluid situations which cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages for a tort or for a breach of contract where the situation is fairly well frozen when the tort or the breach of contract has occurred. Expedition is important to a union, to employees and to an employer since the certification is merely the first step in an often laborious collective bargaining process. When, as here, adequate notice has been given of a hearing date and an opportunity afforded to make representations, the failure of a party to secure an agreement for an adjournment, where it has not been misled by another party to that other's advantage and where the Board has stood above the negotiations and has properly followed its own rules, fashioned for the protection of all parties, there is no denial of natural justice to support a successful resort to *certiorari* against the Board.

Similarly, in *Re Flamboro Downs Holdings Ltd. and Teamsters, Local 879* (1979), 99 D.L.R. (3d) 165 the Ontario Divisional Court upheld the Board's refusal to grant an adjournment with the following comments at pp. 168-169:

In the case of a request for adjournment, [the Board] is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it, the adjournment should be granted or whether the interest of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the party seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

This is not to say that there cannot be situations in which a refusal to grant an adjournment might amount to a denial of natural justice. There are circumstances in which that might be so. . . . It is necessary to examine the facts of each case to determine if the tribunal acted, as it must, in a fair and reasonable way. It must, of course, comply with the provisions of the *Statutory Powers Procedure Act*, 1971 (Ont.), c. 47, and afford the parties the opportunity to be present and be represented, if they wish, by counsel. *But a party who has adequate notice of the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative.* It is for the



Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in labour relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors.

We are all agreed that it cannot be said in the circumstances of this case that the Board conducted itself in an arbitrary fashion in denied natural justice.

[emphasis added]

17. The facts before the Board in *Montgomery Elevator Company Limited*, [1978] OLRB Rep. Jan. 83 bear a marked similarity to the instant situation. In the course of that matter the Board denied an adjournment for a party whose witness was "unable" to attend the hearing. The witness had made a prior arrangement to visit his parents in Florida and left on his trip notwithstanding his prior knowledge of the established hearing date and the opposing party's failure to agree to the requested adjournment. At p. 85 the Board made the following comment:

We note that the applicant was aware on November 23rd of the lack of agreement on an adjournment and that it would have still been open to the witness to either change his scheduled visit dates or alternatively to have made arrangements to interrupt his visit by one day. Exercise of this latter alternative, in today's transportation availabilities, cannot be considered an unusual one.

(See also the Board's decisions in *General Bearing Service Ltd.*, [1980] OLRB Rep. Aug. 1200; *Canada Dry Bottling Company (Kingston) Ltd.*, [1978] OLRB Rep. Nov. 976; *Baycrest Centre of Geriatric Care*, [1976] OLRB Rep. Aug. 432 and *St. Elizabeth Nursing Home*, [1972] OLRB Rep. Apr. 378.

18. As clearly endorsed by the Courts in the quotations set out above, expedition is a particularly important consideration in certification proceedings. Obviously, though, the need for expedition cannot deny a party its entitlement to natural justice. In the instant circumstances the Board was not prepared to adjourn a certification proceeding simply because the company's adviser, who had been informed of the Board's hearing date approximately a week before his departure, felt compelled to attend a golf tournament in Florida. The Board cannot schedule and reschedule its hearings for the convenience of one party's adviser. While it may be natural to try to avoid having to make certain choices, the Board is of the opinion that in this instance the company's adviser was required to choose between attending the golf tournament the day of the hearing and advising counsel at the hearing. Having regard to the Board's general policy concerning adjournments which is designed for the protection of all parties, and the circumstances surrounding the adviser's absence in this instance, the Board was not prepared to delay the certification proceeding by acceding to the requested adjournment, and the majority of the Board, with the Board Member Ronson dissenting, so ruled.

19. Having regard to the foregoing a certificate will hereby issue to the union.



### DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I would order a vote. The evidence leads me to believe that Mr. E. Ziembra threatened Carmella Rossi and her husband. The fact that frustration may have led to an outburst of temper on Mr. Ziembra's part, does not detract from the serious effect of the threat. Mrs. Rossi took the remark seriously: she countered several days later by threatening Mr. Ziembra's life if anything should happen to her family.

2. Mr. Ziembra's direct involvement with a substantial number of membership cards leads to doubt about the entire union membership evidence, and I would order a vote.

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### 0021-83-R United Steelworkers of America, Applicant, v. Dynamic Closures Limited, Respondent

Bargaining Unit – Practice and Procedure – Existing plant in city limits of Cornwall – Impending move to two new plants being built outside city limits – Unit described to embrace new locations in circumstances

**BEFORE:** George W. Adams, Q.C., Chairman and Board Members F. W. Murray and B. L. Armstrong.

**APPEARANCES:** *Michael Lynk, Henry G. Gareau and Brent MacDonell for the Applicant; R. W. Kitchen and B. Labelle for the Respondent.*

### DECISION OF THE BOARD; April 29, 1983

1. This is an application for certification.

2. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The applicant requests a unit of employees described as "all employees of the respondent company in the united counties of Stormont, Dundas and Glengarry, save and except foremen, persons above the rank of foreman, office and sales staff, regularly employed for not more than 24 hours per week, and students employed during the school vacation period." On the other hand, the respondent requests that the geographic scope of the unit be limited to "the City of Cornwall." The Board was advised that the existing plant is within the city limits of Cornwall but that two plants are currently being constructed some three miles away and outside the municipal boundaries of Cornwall in Long Sault. The Board was advised that the employer intends to move to these plants. One plant is scheduled for completion within four weeks and the other by late summer. The applicant seeks a unit that geographically embraces the planned move whereas the respondent contends that there are in effect two bargaining units and that no employees are employed in the one unit embracing the new location. In our view, where a relocation is intended at the time of the certification and the new site is within the labour market of the existing site, the bargaining unit

should be described to embrace the planned move. To hold otherwise in the circumstances at hand, would be to grant the applicant a certificate of very little value. Counsel for the respondent suggested that the expansion of the unit could be a matter for bargaining. But it is clear that the respondent would not be obligated to recognize the applicant at the new location and that strike action to achieve that result would be unlawful. Accordingly, the Board finds all employees of the respondent company in the united counties of Stormont, Dundas and Glengarry, save and except foremen, persons above the rank of foreman, office and sales staff, regularly employed for not more than 24 hours per week, and students employed during the school vacation period to be a unit of employees appropriate for collective bargaining.

3. On the evidence before us, the Board is further satisfied that more than fifty-five (55) percent of the employees in the bargaining unit were members of the trade union as of April 15th, 1983, the time set by the Board for determining membership in a trade union pursuant to section 103(2)(j) of the *Labour Relations Act*.

4. A certificate will therefore issue to the applicant.

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**0988-82-U** Ontario Nurses' Association, Jean Berger and Carol Lindsay, Complainants, v. **Grey Owen Sound Joint Homes for the Aged** (Grey-Owen Lodge), Respondent

Change in Working Conditions – Interference in Trade Unions – Unfair Labour Practice – Lay-off caused by government decision – Employer satisfying Board that union involvement of individuals not factor – Provisional agreement reached at negotiations not union consent for purpose of freeze – Management having right to lay-off during freeze subject to “business as before” limitation – No established pattern of administering lay-off – Board finding no breach

**BEFORE:** G. Gail Brent, Vice-Chairman and Board Members J. A. Ronson and C. A. Ballentine.

**APPEARANCES:** Richard Nixon, Jean Berger, Carol Lindsay, Ella Johnson and Suzanne Holland for the complainants; R. C. Filion, H. L. Van Wyck, Q.C., R. G. Butcher and C. Peterson for the respondent.

**DECISION OF THE BOARD;** April 19, 1983

1. The complainants have complained that the grievors have been dealt with by the respondent contrary to sections 64 and 66 of the *Labour Relations Act* and that section 13 of the *Hospital Labour Disputes Arbitration Act* has been breached. In an earlier decision dated January 20, 1983 the Board determined that it would not hear the section 15 complaint which had been added to the original complaint following the date set for the commencement of the hearing.

2. In paragraph 1 of that decision a chronology of events was set out and is again set out here:

- (a) On January 20, 1981 the complainant association was certified as bargaining agent for registered nurses employed by the respondent.
- (b) Between January 20, 1981 and January 4, 1982 there were negotiations between the parties; however, these negotiations did not result in a collective agreement.
- (c) On January 4, 1982, the complainant association served notice on the respondent to submit all outstanding issues to arbitration pursuant to the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1980 c. 205.
- (d) On August 18, 1982 the complainant association filed its original complaint against the respondent. This complaint did not allege any violation of section 15 of the Act.
- (e) On September 27, 1982 a hearing was convened to hear and determine the complaint. The complainant association amended its original complaint to include an allegation of bad faith bargaining. There was a request for particulars to be filed and submissions were requested on the matter of who would proceed first. The hearing adjourned.
- (f) On September 29, 1982 representatives of the complainant association and the respondent met and resolved all outstanding issues. A memorandum of agreement was signed that day.
- (g) On October 6, 1982 the collective agreement was ratified and it was signed on November 3, 1982.
- (h) On November 18, 1982 the Board convened a hearing to deal with the complaint.

3. The respondent operates two facilities, Lee Manor in Owen Sound and Grey Owen Lodge in Markdale. Prior to July, 1982 the former facility housed approximately one hundred and fifty residents including thirty-nine extended care residents, and the latter housed approximately seventy residents including fourteen extended care residents.

Pursuant to the regulations promulgated under the *Homes for the Aged and Rest Homes Act* R.S.O. 1980, c. 203, extended care residents must be given one and one-half hours of nursing care per day under a Registered Nurse (hereinafter referred to as R.N.). Effective November, 1981 the Ministry of Community and Social Services (hereinafter referred to as COMSOC) had frozen admissions to the Grey Owen Lodge. The R.N. complement at the two facilities prior to July, 1982 was as follows:

Lee Manor – 2 full-time 5 part-time  
Grey Owen Lodge – 2 full-time 3 part-time

4. The Board was given a bundle of documents (Exhibit #2) regarding negotiations with COMSOC concerning the future of Grey Owen Lodge. It would appear from the letters that it was recognized in 1981 that substantial renovations would be needed to make Grey Owen Lodge conform to fire safety regulations. It is also clear that there was a great deal of concern regarding the future of Grey Owen Lodge following COMSOC's announcement in early 1981 that a new Home for the Aged would be built in Durham. The documents outline the dealings between COMSOC and the respondent and indicate that it was COMSOC's position that, upon the opening of the Durham Home, all extended care residents would be transferred from Grey Owen Lodge to Durham, that the number of residents at Grey Owen Lodge would be adjusted downwards and that Grey Owen Lodge would be a residential facility only. In April, 1982 COMSOC approved financing for a plan to build a 100-bed Home for the Aged in Durham, to renovate Grey Owen Lodge to accommodate 41 to 46 residents, and to transfer the extended care residents from Grey Owen Lodge to Durham.

5. It was necessary to reduce the number of residents at Grey Owen Lodge in order to comply with COMSOC's requirements and to effect the necessary renovations with minimum disruption. Mr. Butcher, the respondent's director, testified that it was decided to transfer the extended care residents to other facilities because it seemed the most humane way of proceeding. This was because it would be necessary to move those residents staying in Grey Owen Lodge three times during the course of renovations, and it was decided that the residential people could accommodate the number of required moves better than the extended care people. The elimination of the extended care residents meant that the number of nursing care hours per day was substantially reduced and that it was only necessary to have one R.N. on duty for one shift per day. Because of COMSOC's budgetary control over the respondent, it could not exceed the staffing requirements.

6. The respondent elected to cover the day shift with one R.N. and to assign those duties to its Director of Nursing at Grey Owen Lodge from Monday to Friday. It also decided to cover the weekend day shifts with part-time R.N.s. The Director of Nursing had previously been the only R.N. on duty on the day shift on Monday, Wednesday and Friday and on Tuesday, and Thursday another R.N. had been assigned to the day shift to free the Director of her nursing responsibilities. The respondent therefore determined that it would reduce the number of R.N. positions from two full-time and three part-time to two part-time.

7. In July, 1982 the respondent sent letters (Exhibits #3 and #4) to the two full-time R.N.s and the most junior part-time R.N. notifying them of the changes and the fact that their services would not be required after a designated date in August.

8. There is no doubt from the evidence that the respondent knew that one of the complainants, Ms. Berger was active in the complainant union. The union had been certified for over a year and she was part of the union's negotiating committee. By its own admission, the union was advised in April, 1982 that the role of Grey Owen Lodge



was being changed and that that would lead to R.N. staff being changed and that that would lead to R.N. staff reductions. To summarize, it was the evidence of Mr. Butcher, the respondent's Director, that in July he asked Mr. Van Wyck, the respondent's solicitor, how to reduce staff and was advised to let the full-time R.N.s go along with the most junior part-time R.N.

9. Mr. Butcher testified that staff reductions were also required in all of the other areas of the Grey Owen Lodge operation. The other employees are not represented by a union. There is a staff association. It would appear that there has never really been a layoff at Grey Owen Lodge before and Mr. Butcher asked the staff association to develop a proposal regarding layoff procedures as early as February, 1982. That proposal (Exhibit #7) was not accepted by the respondent's management board and the administration was instructed to deal with the layoffs as it saw fit. Mr. Butcher said that he decided that the staff reduction in the non-R.N. group would be on the basis of departmental seniority. He said that the proposed amendments to the personnel handbook (Exhibit #13) arose out of the staff association's proposal and were not implemented; however, he decided to calculate seniority on the basis set out in paragraph 1 of the seniority section of Exhibit #13 (hours worked back to date of hire) taking into account the provision that seniority would be carried over if an employee transferred from full-time to part-time or vice versa. He also said that he did not implement the layoff provision proposed in Exhibit #13 because he determined that departmental seniority was more appropriate than Home seniority.

10. The respondent's personnel handbook (Exhibit #12), which was in effect at all material times, does not have any provision which deals with layoffs. The handbook recognizes that there are different categories of employees but does not appear to treat them differently for the purpose of seniority. Mr. Butcher said that when the general (other than R.N.) staff were laid off the respondent followed the same practice as it did with the R.N. staff, that is, the part-time and full-time employees were treated separately and layoffs occurred according to departmental seniority within those particular categories.

11. The evidence also shows that in March, 1982 the County Council passed a resolution providing that all those who were laid off as a result of the staff reductions at Grey Owen Lodge should be given priority when the new Durham Home is staffed. Further, there is evidence that one R.N. who was laid off had been recalled to work to fill in for those who were required to be in Toronto at the hearing.

12. It was the undisputed evidence that Mr. Van Wyck alone made the decision to lay off the R.N.s according to seniority and to treat the full-time and part-time R.N.s separately. Mr. Van Wyck was at all material times the respondent's solicitor and was a participant in the ongoing negotiations between the parties. In April, 1982 he was informed that layoffs were going to be necessary, and he then attempted to telephone Ms. Johnston, one of the complainant association's Employment Relations Officers and its representative at the negotiations, to inform her of the layoffs. He was unable to reach her so he wrote her a letter (Exhibit #17) dated April 22, 1982 informing her that layoffs would be necessary and that one R.N. would have been laid off already except for the fact that she applied for and obtained a vacant position at Lee Manor.

13. In July, 1982 Mr. Van Wyck was informed that there would be more layoffs, and his advice was sought concerning the procedure to be followed in laying off the R.N.s. By that time the parties had progressed in their negotiations to the extent that they had provisionally agreed on some items (Exhibit #16). One of the three items was a provision which Mr. Van Wyck interpreted as requiring the respondent to give thirty days' notice to the complainant association if there were to be layoffs, and another was one which Mr. Van Wyck interpreted as requiring the respondent to maintain separate seniority lists for full-time and part-time employees and to treat those groups separately for layoff purposes. Accordingly, he advised Mr. Butcher to layoff the full-time R.N.s and the most junior part-time R.N. Mr. Van Wyck then spoke to Ms. Johnson by telephone on July 21, 1982 and told her (a) that they would be losing the full-time R.N.s along with one part-time R.N.; (b) that the Director of Nursing's schedule was being changed; and (c) that there was a real possibility that the parties could resolve their monetary differences and reach a collective agreement without going to arbitration. They spoke for over one hour and Mr. Van Wyck was told by Ms. Johnson that her staff union was on strike against the complainant association, that she did not know whether or not she should become involved, and that she would let him know the next day whether or not she could become involved. On July 22, 1982 Ms. Johnson told Mr. Van Wyck that she could not deal with the matter and that he should call the complainant association's Toronto office. He did that on July 23, 1982 and conveyed the information to Ms. Lowry, the complainant association's Director of Human Resources.

14. It was Mr. Van Wyck's evidence that, at the time he advised Mr. Butcher to layoff the two full-time R.N.s and the most junior part-time R.N., he did not know the identity of the R.N.s to be affected. He was advised, by Mr. Butcher, on July 21, 1982, of the names of those to be laid off using his criteria, and was also advised that the two remaining part-time R.N.s were not, at that time, members of the union. Mr. Van Wyck needed to know the identity of those affected to prepare the notice letters and to ensure that the notice provisions of the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended, were complied with. Mr. Van Wyck said that he "couldn't have cared less" whether the two most senior part-time R.N.s were members of the union or not because to him the only issue was who were the most senior of the part-time R.N.s. Mr. Van Wyck said that Mr. Butcher expressed concern because the only people being retained were not union members then (they have since become union members), but that he was not concerned because union membership was not a criterion in the making of the decision.

15. There is no evidence to counter the respondent's evidence concerning the means by which the decision was made. The two full-time R.N.s both testified that they believed that the reason for their layoff was because of their union affiliation or activity.

16. Only Ms. Berger testified concerning what she perceived to have been expressions of the respondent's anti-union animus toward her. She related eight incidents or matters which occurred in the year and a half or so since the union was certified. Without going into detail, there were two or three incidents which could possibly be construed as leading to disciplinary action. The strongest possible construction that can be placed on any disciplinary action would be to construe the letter (Exhibit #30) dated May 21, 1981 as being a written warning, and, with all due respect

to Ms. Berger, it is quite possible to conclude that the letter is not disciplinary at all. In cases where Ms. Berger believed the respondent's response to be motivated by anti-union animus she admitted on cross-examination that there was a factual basis for the respondent's complaint of potential hazards such as glass on the floor, water on the floor, pills found at a resident's bedside, etc. and in the latter instance she admitted having received a previous reprimand (Exhibit #38) from the Director of Nursing in March, 1980 regarding the administration of medication. March, 1980 was well before Ms. Berger's involvement with the union. There is no evidence that Ms. Berger was ever threatened with dismissal or that the respondent ever mentioned her union involvement to her. There were no charges made against the respondent at the time of certification.

17. Ms. Lindsay testified that she assumed from conversations with the Director of Nursing that those with most seniority would be retained to fill the two part-time R.N. jobs. She said that she was never promised that she would be retained and that she had the distinct impression that the decision about who to retain was not made by the Director of Nursing, but rather by higher management. Ms. Lindsay testified that she had a good working relationship with the Director of Nursing and had never been aware of any antagonism or discrimination on the Director's part. She described the Director as a fair, conscientious, impartial supervisor who just did her job and who never expressed any opinion about union membership.

18. In connection with the section 64 and section 66 allegations, the Board accepts that the respondent must satisfy the burden of demonstrating, on balance of probabilities, that it has disclosed all of the reasons for the termination of employment or indefinite layoffs, that there are no other reasons, and that anti-union animus played absolutely no part in the decision. In this case, there is uncontradicted evidence that the person who made the decision about whom to layoff was Mr. Van Wyck, and that the basis for his decision was his interpretation of the matters provisionally agreed to in negotiations. He instructed the respondent to lay off by seniority and to treat the part-time and full-time R.N.s separately. There is absolutely no evidence to contradict his statement that he did not realize who would be affected until he was later informed by Mr. Butcher that the two most senior part-time R.N.s were not members of the union.

19. While Ms. Berger no doubt honestly believes that her union activities were a cause for displeasure on the respondent's part and that they were a factor in her layoff, there is no evidence on which we can reach a similar conclusion. Even if the Director of Nursing and the Home's Administrator were displaying anti-union animus, there is no causal link between such anti-union animus and the decision to lay off, nor is there any evidence that the respondent's management played a role in determining who should be let go. Under those circumstances, it would be unreasonable, if not impossible, for us to conclude that anti-union animus was a factor in the decision to let either Ms. Berger or Ms. Lindsay go.

20. There is also an allegation that the respondent breached section 13 of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1980, c. 205. That is the freeze provision of the legislation, and is reproduced below:

Notwithstanding subsection 79(1) of the *Labour Relations Act*, where notice has been given under section 14 or 53 of that Act by



or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

It can be seen that to all intents and purposes it freezes the same sort of things as section 79 of the *Labour Relations Act*.

21. We do not consider, as argued by the respondent, that the provisional agreement reached in negotiations regarding some items can be held to be consent on the part of the complainant association. It was fully understood by both parties that the items agreed to were subject to a collective agreement being reached. We believe that to regard such agreements as being consent for the purpose of the freeze would be to distort the significance of the agreement and could possibly add a factor to negotiations which might hinder their orderly progress.

22. The Board, in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept, 859, articulated a "business as before" rule during the freeze period. In essence, the Board decided that the legislative intent of the freeze was "to maintain the prior pattern of the employment relationship in its entirety." (See paragraph 19 of the decision.) One problem in a first agreement situation is that the parties are in transition from a situation of unrestricted management's rights to one in which collective bargaining will result in some shift in the balance of power as between employer and employees. It is often very difficult in such situations to ascertain what the pattern of the employment relationship was.

23. In this case we were presented with a personnel handbook (Exhibit #12) which we accept as evidence of such a pattern. The problem is that the handbook does not speak to layoffs. That's a difficulty which the respondent itself apprehended when it asked the staff association to present a proposal regarding layoffs. Moreover, given the nature of the respondent's business operation, layoffs were not common and there was no real established pattern for dealing with them which we could ascertain.

24. The respondent here was faced with the need to reduce its R.N. staff because of the situation surrounding the removal of extended care residents and the reduction in the number of residents at Grey Owen Lodge. That situation was not one of the respondent's making, but rather, was one which arose out of decisions made by COMSOC. The complainant association does not question that there was a need for a layoff nor does it question the right of the respondent to respond to the situation. It questions only the basis on which the layoffs were made.

25. In several cases the Board has expressly recognized the right of management to lay off during the freeze. See for example *Burlington Carpet Mills Canada Ltd.*,



[1980] OLRB Rep. Oct. 1361 at p. 1364, paragraph 19; *The Winchester Press Limited*, [1982] OLRB Rep. Feb. 284 at p. 296, paragraph 35; and *Rest Haven Nursing Home*, [1979] OLRB Rep. June 554 at p. 557, paragraph 18. We wish to reaffirm that right, subject to whatever restrictions may be consistent with and implicit in the “business as before” doctrine.

26. What of a situation, though, where changing external circumstances have put the employer in a position where for the first time it must lay off employees? In *The Winchester Press*, *supra* case, the Board was faced with an analogous situation and determined that the employer could exercise its management right to lay off in order to respond to a changed situation. There the people to be laid off were chosen on the basis of their capabilities, rather than on the basis of their seniority. Clearly, the Board must have recognized that, in the absence of any collective agreement or established pattern, the employer’s discretion to establish a means of implementing a layoff remained during the freeze to enable it to meet the legitimate business needs that could arise.

27. We agree that this case appears, at first blush, to bear a resemblance to the situation in *Rest Haven Nursing Home*, *supra*, in that it could be said that the respondent has eliminated an entire classification (full-time R.N.s). In that case, however, the elimination of the classification was not done in response to any external factor or changed function. The crucial element there, insofar as the freeze is concerned, was that the employer had a well established pattern of employing people in the eliminated classification to perform the same functions which still had to be performed and could establish no reason why it should deviate from that practice. Here there was a practice of employing full-time R.N.s on three shifts; however, there is also a valid and compelling external reason to deviate from that practice and to reduce staff.

28. In our view, there is nothing to suggest that there was any established pattern of how to administer layoffs such as would give rise to any privilege on the part of the employees in the bargaining unit. Therefore, unless the respondent is to be prohibited from laying off employees, which is not the complainant association’s position, then it must be allowed to exercise its right to lay off in some way. In this case the respondent chose to lay off on the basis of seniority and to treat full-time and part-time employees as being separate. It followed the same procedure in laying off the members of its general staff. It did not act for any improper purpose in making its decision. It surely cannot be the intent of the legislation and the cases to tie the hands of the employer by prohibiting the employer facing the problem for the first time to determine a way in which to respond to the need to reduce staff. Therefore, having determined that there was a valid reason to reduce staff and no established way of accomplishing such a reduction, the Board must, as in *The Winchester Press* case, *supra* allow the employer the leeway to respond to the new situation in a manner which is consistent with its obligations under the Act. In this case, given all of the circumstances, we do not consider that there is any violation of the statutory freeze.

29. The progress of this case has not been helped by the lack of particularity regarding the alleged violations of section 64 and section 66. Upon reflection, there was no waste of the third hearing day as a result of such a lack and there is no reason to believe that the case could have been completed in three hearing days rather than four. Under the circumstances, costs will not be awarded on account of the delay.

30. For all of the reasons set out above the complaint is dismissed. In dismissing the complaint, the Board believes that, in the interests of avoiding any possible future misunderstanding, it should record its understanding that the resolution passed by the County Council applies to everyone who was indefinitely laid off as a result of the changes at Grey Owen Lodge, including of course, Ms. Berger and Ms. Lindsay.

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**1717-82-U J. Lewis Humphreys, Complainant, v. Service Employees Union Local 204 A.F. of L. - C.I.O., C.L.C., Respondent**

**Duty of Fair Representation - Unfair Labour Practice - Complainant awarded job by employer - Union filing grievance on behalf of unsuccessful candidate and taking it to arbitration - Decision based on union's honest interpretation of agreement - Clause granting preference to blind persons not discriminatory**

**BEFORE:** Ian Springate, Vice-Chairman.

*APPEARANCES: R. Chris Wartman and J. Lewis Humphreys for the complainant; H. Goldblatt, Joe Jordan and J. Gooden for the respondent; Raimo T. Heikkila for the Canadian National Institute for the Blind.*

**DECISION OF THE BOARD; April 14, 1983**

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant, Mr. J. Lewis Humphreys, contends that he was dealt with by the respondent trade union contrary to the provisions of section 68 of the Act.

2. Mr. Humphreys is an employee of the Canadian National Institute for the Blind (the "CNIB") and as such comes within a bargaining unit of CNIB employees who are represented by the respondent trade union. At all relevant times the employees within the bargaining unit were bound by the terms of a collective agreement between the CNIB and the trade union. Article 27 of the collective agreement provides for the posting of any job vacancies, and requires that the CNIB generally consider applicants for the vacancies on the following basis:

"Applicants will be considered on the basis of merit, ability, experience and seniority, and in all cases, employees already within the department in which the vacancy exists shall be considered before those with seniority in other departments."

Also relevant to the filling of job vacancies is article 11.05 which provides as follows:

"11.05 It is agreed that registered blind personnel will be given preference over sighted persons in all cases of job transfer, promotion, demotion, lay-off and recall."

3. Mr. Humphreys is fully sighted. Although he has been in the employ of the CNIB for only a relatively short period of time, it is clear that he has impressed management with both his abilities and his qualifications. Prior to the events giving rise to these proceedings, Mr. Humphreys had been employed in the CNIB's library as a "circulation clerk #1". In either April or May of 1982 the CNIB posted a notice indicating that there was a job vacancy for a "circulation clerk lead hand (Braille)". It appears that no one from the department involved applied for the position. However, both Mr. Humphreys and another library worker, Mrs. Beverley Devey, did apply. Mrs. Devey, who has greater seniority than Mr. Humphreys, is registered blind. The CNIB eventually selected Mr. Humphreys to fill the lead hand position, and he commenced performing the job on or about July 2, 1982.

4. Prior to his being awarded the lead hand position, Mr. Humphreys discussed the matter with Mr. J. Gooden, who is both the union steward for the CNIB library, as well as the bargaining unit's chief steward. During this discussion Mr. Gooden stated that in his view, under the terms of the collective agreement Mrs. Devey should be awarded the job because she was registered blind. Mr. Gooden testified that his interpretation of the collective agreement ruled out the possibility of a competition between blind and sighted employees but instead required that a blind employee who could perform a job be awarded it in preference to a sighted employee, even if the sighted employee was better qualified.

5. When Mrs. Devey was not awarded the lead hand position she filed a grievance requesting that she be awarded the job. During the grievance procedure the management of the CNIB discussed Mr. Humphreys' qualifications with the union and explained why he had been selected for the lead hand position over Mrs. Devey. When Mrs. Devey's grievance was not settled during the grievance procedure, the union decided, without any further discussion with Mr. Humphreys, to take it to arbitration. Although Mr. Humphreys was aware of Mrs. Devey's grievance and of the fact that the union had decided to take it to arbitration, he did not seek to discuss the matter with representatives of the union. The grievance was originally set to come before a board of arbitration on November 1, 1982. In that he might be removed from the lead hand position if the arbitration board were to uphold Mrs. Devey's grievance, Mr. Humphreys had a legal right to participate at the arbitration hearing and to be given advance notice of his right to do so. During the week prior to November 1, management of the CNIB did give Mr. Humphreys a brief notice setting out the date of the arbitration hearing. The notice, however, did not advise Mr. Humphreys of his right to be present at, and participate in, the hearing. The notice also failed to state the location of the hearing. Subsequent to his being given this notice by the CNIB, Mr. Humphreys was approached by Mr. Gooden, the union steward, and asked if he had received notice of the arbitration hearing from management. When Mr. Humphreys replied in the affirmative, Mr. Gooden did not pursue the matter any further.

6. When Mrs. Devey's grievance came on for hearing before the arbitration board on November 1, 1982, the chairman of the board inquired as to the type of notice that Mr. Humphreys had been given. Upon being advised of the contents of notice which the CNIB had given to Mr. Humphreys, the chairman telephoned Mr. Humphreys to fully advise him of his rights. During the resulting discussion, Mr.



Humphreys requested that the hearing into Mrs. Devey's grievance be adjourned to a later date, and on the basis of this request it was adjourned to December 8, 1982.

7. On November 1, 1982 and November 16, 1982 counsel for the trade union wrote the following two letters to Mr. Humphreys:

"November 1, 1982

This will confirm that the hearing which was scheduled to take place today, November 1, 1982, has been adjourned at your request.

As you are undoubtedly aware, a grievance was filed by Ms. Beverley Devey on June 11, 1982, alleging that she had been improperly denied the posted position of Circulation Clerk Leadhand (Braille) without just or sufficient cause. The parties have not been able to resolve this grievance through the grievance procedure and, accordingly, the matter has been submitted to a Board of Arbitration for determination. The Board is chaired by Mr. Owen B. Shime, Q.C.

The hearing in this matter has been re-scheduled for Wednesday, December 8, 1982. As you were the successful applicant on the posting to the job in question, your rights to remain in that position may be adversely affected by the determination of the Board of Arbitration in this matter.

Accordingly, you are entitled to be present at this hearing, to participate fully therein and to be represented by counsel or by some other person as you so desire. If you do not attend on December 8, 1982, the hearing may well proceed in your absence.

We will advise you as soon as we are informed as to the time and place of this hearing."

"November 16, 1982

On November 1, 1982, we wrote to you advising that the hearing in this matter would be held on December 8, 1982.

I have now been advised that the hearing will take place at 70 Bond Street, Suite 200, Toronto, Ontario at 10:00 a.m. I remind you of your rights with respect to this matter as outlined in our previous letter."

8. Subsequent to the adjournment of the arbitration hearing, Mr. Humphreys discussed his situation with the management of the CNIB. Management indicated to him that at the arbitration hearing its interests would be similar to his own. Mr. Humphreys also discussed the matter with Mr. Jordan, the union's business agent. Mr. Humphreys advised Mr. Jordan that in his view the union had a duty to represent him.



Mr. Jordan's reply was that the union could not at the same time represent both he and Mrs. Devey, and that the union would be acting on behalf of Mrs. Devey. On November 24, 1982 Mr. Humphreys wrote the following letter to Mr. Jordan:

"This is to inform you that I received notice from Mr. Goldblatt regarding the new date of the arbitration hearing. The Union should realize that I feel I have a proper claim to the job in question. Prior to the original hearing date, the union failed to tell me that I would have no recourse if the Arbitration Board decided in Bev Devey's favour. I was not told I was entitled to representation or that I could be present. This situation was cleared up by the Arbitration Board chairman and not my union. According to The Labour Relations Act, Section 68, the Union has a Duty of Fair Representation and in this case is not living up to its responsibility. I am a dues paying member and have always been entitled to the same representation as Bev Devey. I request that the Union represent my interests at the Arbitration Board hearing. Your reply in this matter would be appreciated as soon as possible."

Mr. Jordan replied to this letter on November 26th. In his reply Mr. Jordan simply stated that at the arbitration hearing the union would be acting on behalf of Mrs. Devey.

9. The arbitration board reconvened on December 8, 1982, this time with Mr. Humphreys in attendance. The union's position at the hearing was that because Mrs. Devey was a registered blind person, pursuant to article 11.05 of the collective agreement she should have been awarded the lead hand position. Although the evidence on this point is not very clear, it appears that the CNIB questioned Mrs. Devey's qualifications for the lead hand position, and also contended that article 11.05 should be viewed as a "tie breaker" only, and that because of his superior qualifications Mr. Humphreys was clearly the better candidate for the job. Although entitled to do so, Mr. Humphreys chose not to actively participate at the arbitration hearing, apparently because he felt that his interests were being adequately represented by counsel for the CNIB. At the time of the hearing into this complaint, the arbitration board had not yet handed down a decision with respect to the merits of Mrs. Devey's grievance.

10. Mr. Humphreys alleges that the union's conduct violated section 68 of the Act. Section 68 provides as follows:

"A trade union or council of trade unions, so long as it continued to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be."

11. At the hearing into this matter Mr. Humphreys contended that the union had violated section 68 because, in his view:

- 1) the union by taking up Mrs. Devey's grievance favoured her interests over his;
- 2) the union ignored his rights because he is sighted;
- 3) the union failed to meaningfully discuss or consider his interests;
- 4) the union failed to adequately advise him of the arbitration hearing set for November 1, 1982.

12. The simplest matter to be dealt with relates to the lack of proper notice of the arbitration hearing set for November 1, 1982. Mr. Gooden, on behalf of the union, did inquire of Mr. Humphreys as to whether he had received notice of the hearing from the CNIB, and Mr. Humphreys advised him that he had. If Mr. Gooden had pursued the matter further, he would likely have discovered that the notice from the CNIB had not been as full and detailed as it should have been. Mr. Gooden's failure to do so, however, cannot reasonably be characterized as conduct that was arbitrary, discriminatory or in bad faith. It is perhaps worth noting that Mr. Humphreys suffered no damages as a result of not receiving proper notice of the first date set for the arbitration hearing, and that it was the union that did give him proper notice of the second date set for the hearing.

13. The fact that the union decided to forward Mrs. Devey's interests and not those of Mr. Humphreys does not by itself establish a violation of section 68 of the Act. Trade unions in seeking to administer collective agreements are frequently obliged to take positions which will favour one employee over another, or one group of employees over another group and it cannot reasonably be said that each time they do so they violate the Act. That unions must at times decide between the interests of different employees is evidenced by the facts of the instant case. Mrs. Devey would not have been able to have her grievance heard by a board of arbitration without the support of the trade union. In the result, had it not taken Mrs. Devey's grievance to arbitration, the union would have been supporting Mr. Humphreys at the expense of Mrs. Devey since Mr. Humphreys would have remained unchallenged in the lead hand position.

14. At the time that the union made its decision to take Mrs. Devey's grievance to arbitration, and thereby challenge management's decision to award the lead hand position to Mr. Humphreys, it was required by section 68 of the Act to make its decision in good faith and not in a manner that was arbitrary or discriminatory. There is nothing before the Board to indicate bad faith on the part of the union towards Mr. Humphreys. The union made its decision to support Mrs. Devey's grievance not because of any ill will towards Mr. Humphreys, but only because it felt that under the collective agreement Mrs. Devey had a right to be awarded the lead hand position. The union did not act arbitrarily in the sense of not putting its mind to the issues involved. Even before the CNIB awarded the lead hand position to Mr. Humphreys, Mr. Gooden, the union steward, advised Mr. Humphreys that the wording of the collective agreement supported Mrs. Devey's claim to the job. Mr. Humphreys now claims that the union failed to meaningfully discuss or consider his interests. At no point, however, did Mr. Humphreys seek to convince the union that its interpretation of the collective agreement was in error. At the hearing into this matter Mr. Humphreys contended that the union should have inquired further into his own qualifications. In its decision

making, however, the union was apparently prepared to accept management's contention that Mr. Humphreys was more qualified than Mrs. Devey. On the basis of its interpretation of the collective agreement the union felt that the question of who was the more qualified was simply not the determining factor. As to whether or not the union's interpretation of the collective agreement was the correct one is a matter for the arbitration board to decide. It is sufficient for these proceedings to conclude that the union's interpretation of the agreement was not so unreasonable as to indicate that it reached its interpretation in an arbitrary manner.

15. The only remaining issue, then, is whether in deciding to champion Mrs. Devey's grievance, the union acted in a discriminatory manner towards Mr. Humphreys. Mr. Humphreys' claim that his rights were ignored because he is sighted contains an implicit claim that he was discriminated against by the union because he is sighted. Article 11.05 of the collective agreement does clearly provide that preference in job postings is to be given to registered blind personnel. (In this regard, apparently the only issue in dispute between the union and the CNIB is the degree of preference a blind person should receive). If this type of differential treatment in the collective agreement is the type of "discrimination" section 68 of the *Labour Relations Act* is meant to prohibit, then in my view an attempt on the part of the union to enforce the article would amount to a breach of the Act.

16. In considering article 11.05, it must be kept in mind that frequently collective agreements give preference to one group of employees over another. For example, employees with more seniority commonly have certain preferences over employees with less seniority, and full-time employees frequently are given priority over part-time or casual employees. Every such preference cannot reasonably be viewed as a form of discrimination such that a trade union is prohibited from enforcing it under section 68 of the Act. In my view section 68 is aimed at protecting members of minority groups from being discriminated against on the basis of invidious and unsupportable grounds. Some assistance in discerning what the Act regards as improper discrimination can be found in section 48 of the Act wherein it provides that an agreement shall be deemed not to be a collective agreement "if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin." None of these grounds are present in this case. We live in what is very much a sighted world. Unfortunately all too often blind persons are passed over for jobs even when they may be qualified to perform them. Against this background, I do not believe that a preference to registered blind the type of discrimination which the legislature sought to prohibit by section 68 of the Act. I find support for this conclusion in the provisions of the *Human Rights Code*. Although the Code prohibits discrimination with respect to employment because of a handicap, section 13 of the Act stipulates that a special program designed to relieve hardship or to assist disadvantaged persons is not a violation of the Code. Article 11.05 of the collective agreement may, or may not, amount to "a special program" under the Code. However, given the clear intent of the Code to allow special programs to help disadvantaged persons, such as those with a handicap, I do not believe that the legislature meant section 68 of the *Labour Relations Act* to prohibit similar provisions in a collective agreement, or to prohibit a union from trying to enforce its interpretation of such a provision.

17. Having regard to the above, this complaint is hereby dismissed.

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**1577-82-R** Marvin MacKay on behalf of a group of employees, Applicant, v. United Steelworkers of America, and its Local 13571, Respondent, **Irwin Toy Limited**, Intervener

Petition – Termination – Petition preamble referring to local when parent union party to certificate and agreement – Test whether possibility of confusion – No actual or perceived management involvement – Employer's previous expression of hope that union representation will end not affecting voluntariness – Plant Manager's secretary delivering petition to Board not having bearing on voluntariness of signatures – Petition voluntary

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and C. A. Ballentine.

*APPEARANCES* Howard Levitt, Marvin MacKay and Israel Palter for the applicant; James Hayes, Bram Herlich and Alex Muselius for the respondent; A. D. G. Purdy for the intervener.

**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER J. A. RONSON;** April 6, 1983

1. This is an application for a declaration terminating bargaining rights under section 57 of the *Labour Relations Act*. The respondent union was certified as bargaining agent for the employees of the intervener at its plant in Etobicoke and following a difficult strike a first collective agreement was concluded. This application to terminate the bargaining rights comes at the first open period available under the Act, and is strenuously resisted by the respondent union.

2. Section 57 of the Act provides, in part:

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

• • •

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.



3. In the instant case the employee petition to terminate the union's bargaining rights was sponsored by Mr. Marvin MacKay. An employee of some 27 years, Mr. MacKay opposed the union at the time of its certification. He did not support the strike and made no secret of the fact, even after the settlement, that he did not wish to be represented by the union. He and a few other employees of like mind contacted the Board approximately a year ago to inquire by what means the union's bargaining rights could be terminated. They then received copies of the layman's Guide to the Ontario Labour Relations Act and a copy of the Act from the Board.

4. Following the advice in the guide, as the open period approached Mr. MacKay called the lawyer referral service of the Law Society of Upper Canada and by that means was eventually referred to counsel who represented him in these proceedings. His counsel instructed him on how to proceed, and according to his testimony, specifically told him not to have any contact with management with respect to his efforts to terminate the union's bargaining rights.

5. With the advice of counsel Mr. MacKay himself drafted and hand printed the preamble to his petition which reads:

I, the undersigned, member of the bargaining unit of the United Steelworkers of America Local #13571 at Irwin Toy (165 North Queen) no longer wish to be represented by that Local union. As such I hereby request the Ontario Labour Relations Board to terminate the bargaining rights of the United Steelworkers of America Local #13571 at Irwin Toy 165 North Queen St.

6. On the morning of November 11, 1982, at 6:00 a.m. Mr. MacKay stationed himself on the sidewalk adjacent to the main entrance to the plant known as the Freightliner Driveway. With the petition on a clipboard he solicited the signatures of employees coming on shift until approximately 7:55 a.m. at which time he went to work himself, as scheduled. In that period he obtained twenty signatures, in addition to his own.

7. Mr. MacKay next found himself approached at work by several employees during the morning. He did not feel that he could sign any of them on company premises, and so instructed some to meet him at the coffee truck at 11:30 a.m. and others to meet him at the gate at noon. At 11:30 a.m. he met four people at the coffee truck in the plant parking lot near some shipping doors. The employees then accompanied Mr. MacKay to the gate where he obtained their signatures on the sidewalk outside the plant. He returned to the plant and punched out again at 12 noon, returning to the sidewalk outside the gate until 12:30 p.m. In that period he obtained a further seven signatures. These latter signatures, like the four obtained at 11:30, were on a second page of the petition. That concluded his efforts for that day, with a total of thirty-two signatures on his petition.

8. On December 1, 1982 Mr. MacKay printed a supplementary petition with the preamble:

We the undersigned employees of Irwin Toy Limited at 165 North Queen would like to add our names to previous petition dated

November 18, 1982 calling for end to bargaining rights of United Steelworkers of America.

He testified that the second document was prepared because a few additional employees told him they wished to sign, and because two employees whose signatures were obtained on November 11th had apparently signed documents of revocation favouring the union and advised him that they wanted to reaffirm their support for his petition. The four signatures in the supplementary petition were obtained on December 1, 1982 in the cafeteria at the back of the plant between 11:30 a.m. and noon.

9. The petition collected on November 11, 1982 was delivered by Mr. MacKay to his lawyer at 2:00 p.m. on November 12, 1982. His counsel then forwarded it to the Board. The second, which was signed on the morning of the terminal date, was taken to the Board for Mr. MacKay by Margaret Mayhew, a secretary at the plant, during her lunch hour on December 1, 1982.

10. Counsel for the union submits that the petition should be rejected on a number of grounds. Initially he submitted that it should be disregarded because of the preamble. The document refers to the United Steelworkers of America, Local #13571 as the union whose bargaining rights are being terminated. In fact the bargaining rights are held by the parent United Steelworkers of America, the body which was certified by the Board and which executed the collective agreement. The affairs of the bargaining unit are, however, administered by Local #13571 of the union. Local #13571 gives notice to the employees of meetings, in its own name. It conducts meetings and has held itself out as bargaining with the company on behalf of the employees. A notice to employees filed as an exhibit, relating to a meeting on November 30, 1982 is headed "Local 13571 at Irwin Toys, North Queen, Membership Meeting". There is no possibility of confusion in that no other bargaining rights are held in the plant by any other union. As the Board has noted in a similar circumstance in the past, when there is no doubt about the intention of the document, substance should prevail over form, particularly when the document in question was drafted by a layman. (*Genwood Industries Ltd.*, [1976] OLRB Rep. Aug. 417; *Armbro Materials & Construction Ltd.*, [1976] OLRB Rep. Nov. 743.) As the Board noted in *Armbro* (at p. 748):

The minimal test ... is for the Board to ask itself whether the wording and form of the document at the time the employees signed it were such as to make the intention and purpose of the document clear and unequivocal in the minds of the persons signing.

When that test is applied in the instant case we have no doubt that the employees knew that the document filed was clearly and solely intended to terminate the bargaining rights of the Steelworkers in the plant. Local 13571 is an agent of the parent union. Its extended involvement with the employees has been such as to blur any practical distinction between the parent and the local in the minds of employees. There is no doubt, however, that the employees know that Steelworkers, acting through the local was their bargaining agent and could reasonably conclude that the petition was aimed at terminating its bargaining rights. On that basis at the hearing we ruled against the preliminary motion of counsel for the union to dismiss the application on the basis of a technical defect in the preamble. We might now add that we do not see anything in the

wording of the preamble that would materially affect the voluntariness of the petition document.

11. The Board's task in an application under this section was recently reviewed in the decision of *Third Dimension Mfg. Ltd.*, [1982] OLRB Rep. Dec. 1942. In that case the Board commented, at p. 1946-47:

The use of the word "voluntarily" in the section makes it necessary for the Board in every case to satisfy itself that the petition or statement filed in support of the application represents a reliable expression of employee wishes, reasonably free from a concern that their expression one way or the other will come to the knowledge of their employer. On the other hand, employer knowledge that a petition is being taken up against the union, or the recognition by employees that an employer would prefer to be without a union, are not in themselves matters which disturb the Board. See *Parkers Dye Works and Cleaners Limited*, [1974] OLRB Rep. Dec. 859, at paragraph 37; *Cooper Weeks Limited*, [1967] OLRB Rep. Aug. 455.

In addition, the Board has noted the practical distinction which time and other intervening factors may create in assessing a petition which accompanies a termination application, as opposed to one which arises at the time of initial certification. In *Northern Telecom Canada Limited*, [1979] OLRB Rep. Apr. 330, for example, the Board cited an earlier comment in *N. J. Spivak Limited*, [1977] OLRB Rep. July 462, as follows at paragraph 10:

Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, [now 57], the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application filed under section 49 of the Act.

12. The Board has noted in a number of cases that where there were grounds for a reasonable perception on the part of employees that management is aware of the petition and may become informed of who does and does not support it the document may not be accepted as freely signed by the employees. In every case, however, the Board must carefully weigh the evidence to determine the conclusion to be drawn in the particular circumstances.

13. For example, in *Northern Telecom Canada Ltd.*, [1979] OLRB Rep. Apr. 330 three employees sought to terminate the bargaining rights of a union and proceeded in a way not dissimilar to the circumstances of this case. They contacted the Board to seek advice on how to proceed and obtained the names of three lawyers. They retained counsel and took his advice on how to proceed. The signatures of employees were initially solicited at three entrances to the plant beginning at 6:15 a.m. on a Monday



morning, as the day shift came to work. The evidence established that at least one supervisor was in the vicinity and inquired as to what was being signed. In the circumstances of that case, however, the Board was satisfied that employees would not have been apprehensive and could freely choose to sign according to their own wishes. The Board concluded (at p. 333-34):

In this case the circulation of the statement inside the plant gate on February 19th must be viewed in light of the fact that union literature was frequently disseminated on company premises (albeit outside the plant doors on most occasions). The employees of this company frequently received union literature on company premises. Although the persons who handed out the literature on behalf of the union were on company premises with the permission of the company there is no suggestion that the employees ever viewed the leaflets or other literature as company inspired or vetted. The petitioners in this case positioned themselves inside the gate for a single 45 minutes period. . . .

While the employees entering the plant on February 19th may have assumed that the circulators had obtained permission from management to be inside the gate, which they had not, we are not prepared to conclude that these employees would also have assumed in this case that management was involved in and supported the circulation of the statements and would likely become aware of the names of those who signed and those who did not. In the absence of any sudden change of heart the Board is not prepared to conclude in these circumstances that employee freedom of choice in this matter was impaired by virtue of the statements being circulated on company premises and, on the morning of February 19th, at a time when the night supervisor was in the vicinity.

14. The foregoing cases should not be taken for the proposition that management awareness of a petition or the employee's perception of it is an irrelevant fact. It clearly is relevant. They do represent instances however, where the Board has acknowledged that in an application for termination the mere possibility of employer knowledge or a slight indication of it will not, *ipso facto*, destroy a petition, and that the Board must consider all the facts in giving weight to that factor.

15. Counsel for the union urged the Board to find that the petition could not be voluntary in the circumstances of this case. In this regard he relied on the position in the plant occupied by Mr. MacKay and employee perception of his proximity to management, as well as on the position and involvement of Ms. Mayhew. He further submits that the public gathering of signatures for the petition at the plant gate, in an open space visible from management offices approximately 100 yards away, would deprive employees of the ability to freely choose whether to sign his petition. He also pleaded the content of statements made some time previously by the plant manager to employees who had worked during the strike.

16. We deal firstly with the issue of Mr. MacKay's position. The evidence establishes that the applicant is a long-standing employee with perhaps the greatest



seniority in the plant. He works as a warehouseman, a position in the bargaining unit, and exercises no supervisory or managerial functions. There is no evidence to suggest that he is in a position to influence the job security or prospects for advancement of any employee. While Mr. MacKay's brother, Gordon MacKay, is a foreman there is no evidence whatever to link the applicant's brother to his petition or to rebut his own testimony that he never discussed the subject of this application with his brother. In that regard Mr. MacKay testified that he followed the suggestions in the layman's Guide to the effect that management could have no involvement. The evidence also establishes that Mr. MacKay occasionally takes instructions directly from Mr. Douglas Lowe, the plant manager. Much of Mr. MacKay's work, however, involves little or no supervision, as he is responsible for moving material to and from the plant showroom and preparing and dismantling toy displays in that location. By his own account he would normally be in Mr. Lowe's office once a week.

17. The Board must obviously look with some care to a petition filed by an employee who is particularly close to management. By the same token, however, such an employee should not lightly be deprived of the right to participate in the processes under the Act respecting union representation. Care must be taken in each case to determine whether the perceived link between management and a given employee could have a material impact on the willingness of employees to express their true wishes. If the evidence were to indicate, as it does not, that Mr. MacKay is in a supervisory capacity or could influence conditions of employment we might have greater concern. There is, however, no evidence of that kind. This is not a case, moreover, where the secrecy of employee sympathies has the same degree of sensitivity that would be found in an application for certification. In weighing this aspect of the evidence regard must be had to the fact that the employees who supported the union had previously engaged in a strike in which the lines between the two camps among the employees were fairly clearly drawn. With a first collective agreement in place, and the identity of those employees who had supported the strike a matter of public knowledge any concern or apprehension with respect to identifying employees who support the union is considerably diminished.

18. It is difficult to ascribe any weight to the fact that Mrs. Mayhew, who works as the secretary to Mr. Lowe, carried the second petition to the Board for Mr. MacKay during her lunch hour on the terminal date. There is no evidence to suggest that any employee was aware of this limited degree of involvement on the part of Mrs. Mayhew, an involvement which is entirely limited to the period of time after which all of the signatures were obtained. Whether or not one agrees with counsel for the union that Mrs. Mayhew's involvement would not be lost on the employees, the point is of little consequence in that the employees had no knowledge of her involvement prior to signing the petition. It should perhaps be stressed that she too is a member of the bargaining unit. The Board can find nothing sinister in the fact that she carried the petition on her lunch hour or that she had some uncertainty in her recollection of the precise time that it took.

19. The aspect of the evidence most heavily stressed in the argument of counsel for the union is the fact that Mr. MacKay gathered signatures for his petition openly at the plant gates. He submits that this was tantamount to placing the employees in the position of being questioned in an open meeting about their support for the union. He submits that the situation was still worse in that employees were approached in a

location where their encounter with Mr. MacKay could possibly be observed by members of management in the adjacent building. The inference which he asks the Board to draw is that employees would have been intimidated both by the presence of Mr. MacKay and by the possibility that their encounter with him might be witnessed either by a member of management who might be coming through the gates or someone watching from a plant window.

20. The evidence does not disclose that any member of management came through the gates at the time that Mr. MacKay stood there with his petition on the morning of November 11, 1982. It appears, however, that for a time at least several union supporters stood near Mr. MacKay and heckled him in an attempt to discourage employees from signing his petition. While the possibility of there having been some observation by members of management from the plant building is something the Board must carefully examine, it is difficult, on the evidence, to ascribe any substantial weight to that factor. Firstly there was no evidence adduced to establish which members of management would have been present between the hours of 6:00 and 8:00 a.m. nor any evidence to confirm that any persons were in fact watching Mr. MacKay's endeavours from the plant building. Moreover, with the building being at approximately 100 yards distance from the place where Mr. MacKay stood it appears unlikely to the Board that the employees would have felt a looming and unseen presence as they were approached by Mr. MacKay. In this regard the facts are not unlike those found by the Board in the *Northern Telecom* case (*supra*) where in fact one member of management was apparently aware of the activity of the anti-union petitioners.

21. The circumstances of the morning of November 11, 1982 must be viewed in their context. By Mr. MacKay's own admission there was no secret about what he was doing that day. Virtually all of the employees knew it and were free to sign or not sign his petition as they chose. The issue of being identified with the union is, as the Board has noted, considerably qualified in the circumstances of this case. The employees being approached by Mr. MacKay had experienced a protracted and difficult strike not long before. At that time they made known their support or opposition to the union by their support or opposition to the strike. This is not a situation in which a union was being newly organized and employees need fear for being identified as union supporters. Neither is this a situation in which employees have had an overnight change of heart; with the passage of the strike and a first collective agreement the employees could bring an experienced and considered point of view to bear in their decision to support or oppose Mr. MacKay. In these circumstances the Board is not inclined to conclude that employees who signed Mr. MacKay's petition either on November 11, 1982 or December 1, 1982 were deprived of the ability to exercise their free choice.

22. Counsel for the union sought to establish management inspiration of Mr. MacKay's petition through the evidence of Mr. Anthony Branco, an employee in the bargaining unit whose father is the assistant warehouse manager in the plant. The evidence establishes that Mr. Branco, who worked through the strike, was in attendance at a meeting between Mr. Lowe and nine other employees held shortly after it became known that the strike had ended and the union had reached an agreement with the company. At that time Mr. Lowe indicated to the employees who had not participated in the strike and who expressed concern about their future that he could not give them raises or promotions without regard to the collective agreement and that their own

opportunities for advancement would be necessarily restricted under the union. The Board is satisfied that on that occasion he indicated to the employees that things could only get better if at some future time the union were to be terminated. Mr. Lowe told the employees "hopefully somewhere down the line I'll be able to look after you".

23. We cannot disagree with counsel for the union that a conversation of that kind is disturbing to the union's interest. It is plainly the statement of the employer's hope that union representation would end in the plant. Even accepting that, however, it is difficult on the evidence before the Board to link that statement with some collusion or complicity between Mr. MacKay and the employer in the origination and circulation of the petition that is the subject of this application. There is nothing in the evidence to suggest that any other employees were aware of the statement, which apparently came to the union's attention on the eve of the hearing. There is also no evidence that management communicated to any employees that it intended to support a petition of termination or that it was sympathetic to Mr. MacKay's endeavours. Employees could, of course, draw their own conclusions as to management's view of the union, particularly in light of the stormy events leading to the first collective agreement. But those bare facts, including the statements of Mr. Lowe, cannot be stretched into an inference that employees were in fear of their jobs or without the ability to freely choose to sign the petition. That is the issue in this application. In effect the union asks the Board to convert suspicion into legal conclusions. That we cannot do. We cannot conclude on the evidence before us that the petition filed does not represent the voluntary wishes of the employees who signed it.

24. For the foregoing reasons the Board will conduct a representation vote of the employees in the bargaining unit. Those eligible to vote are all employees of the intervener employed at 165 North Queen Street, Etobicoke, save and except foremen and foreladies, office and sales staff and students employed during the school vacation period on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

25. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with the intervener.

26. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER C. A. BALLENTINE;**

1. I dissent from the majority decision to accept the petition as a voluntary expression of the employees.

2. I believe from the evidence it is quite reasonable to conclude that the employees who signed the petition in this case would have a perception that management would be aware of the petition and that management would be informed of who signed and who did not. I believe the employees would be naive if they had any other perception.

3. Mr. Douglas Lowe the Plant Manager, held a meeting with ten employees shortly after a long bitter strike in 1981. He advised these loyal company employees



who had worked during the strike that things could only get better for them if, at some time in the future, the union's bargaining rights were to be terminated. He said "hopefully somewhere down the line I'll be able to look after you". In my view, Mr. Lowe was at this stage planting the seed and was encouraging these loyal company personnel to organize for a termination petition which came to fruition on December 1, 1982.

4. Mr. Marvin MacKay, one of the most loyal employees, along with a few other employees contacted the Board around the same time that Mr. Lowe had met with them. They received from the Board copies of the layman's Guide and the *Labour Relations Act*. MacKay was on his way to organizing for the petition in an endeavour to rid the company of the union.

5. The evidence is quite clear that Marvin MacKay the person who circulated the petition is a privileged employee who reports directly to Mr. Lowe. When pressed under cross-examination MacKay admitted he would visit Mr. Lowe's office at least once a week. Although MacKay has no official managerial classification, it would appear that he has a closer contact with Mr. Lowe the top management person, than the plant foremen have, including his brother Gordon. The foremen report to Mr. Branco the Assistant Plant Manager, whereas MacKay goes directly to Mr. Lowe. MacKay apparently has the privilege to adjust his regular working hours, when he was questioned about leaving early at 2:00 p.m. Friday, November 12th to meet with his lawyer in processing the petition. He said it was normal for him to leave early on Fridays, on November 11th he also varied his lunch hour to gather more names on the petition. He didn't find it necessary to get permission, Marvin MacKay appears to be his own boss outside of Mr. Lowe.

6. On November 11, 1982 MacKay stationed himself at the main gate from 6:00 a.m. to 7:55 a.m. MacKay is an imposing figure. He must weigh well over 200 pounds. He had the petition on his clip board, the same clip board that he attaches to the front end of his fork lift machine which he drives around the warehouse. MacKay succeeded in having twenty-one employees at this time sign the petition. One by one he had the employees stop, print their name, sign their name, print their address and then MacKay signed as the witness. MacKay would certainly stand out and be noticed, (Counsel for the trade union suggested all he lacked was a neon sign). It is naive to think that management would not observe him and that the employees would not be apprehensive that management would become aware of who did and did not sign. In MacKay's own words, "it was no secret everyone knew what was going on".

7. By December 1, 1982, Marvin MacKay had succeeded in having thirty-six employees sign the petition. That afternoon he arranged for Mrs. Margeret Mayhew, Mr. Lowe's secretary, to deliver the petition to the Labour Board. Mrs. Mayhew gave evidence that she works in the office with two other women, both of whom report to Mr. Branco the Assistant Plant Manager but that she reports directly to Mr. Lowe. Mrs. Mayhew's story is not credible. She would have the Board believe that she took her lunch break at 2:00 p.m. and travelled by taxi from 165 North Queen in Etobicoke to the Labour Board at 400 University Avenue, downtown Toronto and returned to her office by public transit within forty-five minutes. However, a check of the Board's file shows that the petition was received by the Board on December 1, 1982 at 2:35 p.m. If



Mrs. Mayhew was to be believed it would mean she travelled to the Board by taxi and delivered the petition to the 4th Floor at 400 University Avenue in thirty-five minutes and returned by public transit to her office in 10 minutes. Mrs. Mayhew said she didn't get permission to leave from Mr. Lowe. She said it wasn't necessary and it was her forty-five minutes lunch break. She said that she didn't know if Mr. Lowe was even in the office that day. When Mrs. Mayhew was questioned as to the unusually late hour to take a lunch break and, whether she had lunch at all that day, she told the Board that she generally takes her lunch break when she wasn't busy in the office and she seldom ate lunch. Mrs. Mayhew's story is incredible.

8. The Board has found in a considerable number of cases that it must be guided by the overall environment in the work place and the cumulative impact of events. The Board must be satisfied that the statement of desire filed in support of the termination application represents a free and voluntary expression of the employees wishes. If the Board is not satisfied from the evidence then the Board must not put the trade union's bargaining rights to the test of a representation vote and risk the termination of hard earned bargaining rights.

9. If the Board finds that the hand of management is involved, the Board must dismiss the petition. Mr. Douglas Lowe the Plant Manager let it be known to the loyal company employees, who worked through the long and bitter strike that the only way they could be suitably treated was to terminate the union's bargaining rights. The only two employees that report directly to Mr. Lowe participated in the processing of the petition. They obviously felt at liberty to take time off during their normal working hours to process the petition.

10. If the Board finds that it cannot believe the evidence of those employees that sponsored and circulated the petition then there remains no evidence upon which the petition can satisfy the onus of voluntariness and the petition must be dismissed. Marvin MacKay's evidence, that he never discussed the petition that he had planned for a whole year with either his brother a plant foreman and/or with Mr. Lowe the plant manager who he met with at least once a week, is just not believable. The story told by Mrs. Margaret Mayhew, Mr. Lowe's secretary, as I have stated before, is incredible and totally beyond belief.

11. If the Board finds above all that if the employees signed the petition in an environment and under conditions that they would reasonably believe and would have fears that their expression would become known to management then the Board, in all such cases, has given no weight to the petition and has dismissed the termination application. How could any employee in this case have confidence that their "free" expression would not become known to management, when they were approached to sign the anti-union petition by MacKay. Marvin MacKay is a privileged company man with twenty-seven loyal years to the company. He has a free hand to vary his normal working hours without permission and is a person who reports directly to the top management person of Irwin Toy Limited at least once weekly.

12. In this era of high unemployment and in this particular case, this Ontario Labour Relations Board should use great care and diligence in weighing the overall environment and the cumulative impact of events, before it comes to the conclusion

accepting this statement of desire as being the voluntary expression of the employees and thereby placing the trade union's bargaining rights in jeopardy. The Board said in the *Piggot Motors (1961) Ltd.*, case, 63 CLLC, para ¶16,264:

*... In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.*

(emphasis added)

This statement and position of the Board applies as much if not more today than it did in 1961. Workers today are faced with the highest rate of unemployment they have been faced with since the great depression of the 1930's. Those that have employment have a natural fear of losing their jobs and normally would not want to provoke management. These are trying times for trade unions. They are especially facing difficult times in their endeavours to organize and represent workers often after spending extended periods of time to accomplish 55% membership, to obtain outright certification. They are met with anti-union petitions to force representation votes and after obtaining certification it is not unusual to be met by a stubborn employer in negotiations for a first agreement. The trade union in this case witnessed that type of experience.

13. I find that the majority have not carried out a realistic appraisal in weighing the overall environment and the cumulative impact of events when they came to a conclusion to accept the statement of desire as voluntary and ordering a representation vote. I don't believe that the true wishes of the employees could be ascertained within the environment at Irwin Toy Limited.

14. It is my position that the statement of desire, the petition, is defective on three accounts.

- (i) management involvement;
- (ii) the two persons that processed the petition lacked credibility;
- (iii) the petition is not a free and voluntary expression of the employees that signed it.

I would have dismissed the petition and would have preserved the trade union's bargaining rights.

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**2459-82-M** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Applicant, v. **Joe Arban Contractor Limited**, Respondent

Adjournment – Construction Industry Grievance – Practice and Procedure – Adjournment caused by employer’s failure to produce documents as per summons – Union requesting costs of the day – Board awarding costs only in exceptional circumstances – Review of Board’s authority to award costs – No costs

**BEFORE:** Corinne F. Murray, Vice-Chairman, and Board Members F. W. Murray and H. Kobryn.

**APPEARANCES:** *B. Fishbein, D. Demonte and A. Vervaeke for the applicant, Joseph Arban for the respondent.*

**DECISION OF THE BOARD;** April 13, 1983

1. This is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*.
2. This matter came on for hearing on March 29, 1983. The applicant was not able to proceed because of Joseph Arban’s failure to produce the documents listed in the summons, properly served on him March 23, 1983.
3. Counsel for the applicant requested the Board to direct Mr. Arban to reappear at a date to be fixed and produce the documents set out in the summons. The Board granted this request and orally directed Mr. Arban to attend at a hearing, at a date to be fixed, and produce all the documents, papers and other material set out in the summons served upon him on March 23, 1983.
4. Counsel for the applicant also requested that the Board assess the “costs of the day” against Mr. Arban. The Board reserved on this request.
5. The Board has only granted costs in essentially two instances:
  - (a) as compensation for the expenses of one party that would result from an adjournment to convenience the other party (see *Metropolitan Toronto Apartment Builders Association*, [1970] OLRB Rep. Nov. 846; *Repac Construction Ltd.*, [1976] OLRB Rep. Oct. 610, at paragraph 10 for analysis); and
  - (b) as a part of a “make whole” order or as damages flowing from a violation of the Act (*Academy of Medicine*, [1977] OLRB Rep. Dec. 783; *Suzanne Hebert-Vaillant*, [1981] OLRB Rep. June 623).
6. The Board will not, as a regular part of the exercise of its remedial powers in response to a finding that the Act has been violated, grant the successful party its costs. There must be sufficient overriding policy considerations or extraordinary circumstances (*Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Comstock Funeral Home*, [1981]



OLRB Rep. Dec. 1755). Similarly, a party who has failed to prove a complaint will not in the normal course be required to pay the opposite party's costs (*Albert Shiwinski*, [1981] OLRB Rep. Nov. 1542; *Montgomery Elevator Co.*, [1978] OLRB Rep. Jan. 83).

7. It has also been exceptional that adjournments have been granted on condition that the party seeking it pay the other's costs for the day "wasted". Even where a party has received an adjournment without costs upon certain conditions being fulfilled and these conditions were not fulfilled, the Board has not granted costs (see *New Gregory House*, [1980] OLRB Rep. June 873). Indeed the Board has in *Repac*, supra, and the cases cited therein expressed doubt as to the extent of the jurisdiction to award costs when this is not part of its general remedial power.

8. The common thread running through all of these cases is that costs ought not to be awarded as a punishment. In exceptional circumstances costs must be granted to compensate for results of violations of the Act or for adjournment expenditures. Since adjournments to which all parties have consented are exceptional, costs are the price, in some instances, of succeeding in obtaining a unilaterally requested adjournment.

9. There has been only one reported case where the Board has dealt with the matter of costs in a section 124 proceeding. The Board in *Master Insulation Ltd.*, [1979] OLRB Rep. Mar. 237 rejected a request for costs of a day during which a summons witness refused, on the advice of his counsel, to be sworn and give evidence. The Board on that occasion expressed doubt as to its jurisdiction to grant costs. In a subsequent application to the Divisional Court by way of stated case pursuant to section 13 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, the Court found that the Board when exercising its power under section 124 did so as an arbitrator (see *International Union of Heat and Frost Insulators* (1980), 5 O.R. (2d) 8). Section 124(3) gives the Board the powers and jurisdiction of an arbitration board under section 44. Other boards of arbitration exercising powers under section 44 have refused generally to grant costs because the Act does not grant them such powers and the longstanding practice (often stated in collective agreements) that the parties to the arbitration share the cost of the arbitrators (see *Canron Ltd.* (1973) 2 L.A.C. (2d) 273, affiliated 10 L.A.C. (2d) 336n (Ont. Div. Ct.). The Board sitting as an arbitrator pursuant to section 124 also has not been granted the power to assess costs and section 124(4) specifically provides for the equal sharing of expense of the proceedings, as fixed by regulation. Therefore the Board affirms the doubts expressed by the panel in *Master Insulation Ltd.*, supra, and since the case before us does not fall within the exceptions noted in paragraph 5, we decline to award costs.

10. The matter of the continuation of the hearing on the merits will be referred to the Registrar.

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**1889-82-R** Labourers' International Union of North America, Local 1059, Applicant, v. **Kent County Contractors**, a Division of 504961 Ontario Limited and/or Elgin Construction Company Limited, Respondent, v. Group of Employees, Objectors.

**Certification – Practice and Procedure – Related Employer – Status of alleged related employer's employees to participate challenged – Board deferring ruling until evidence and representations received on related employer and build-up issues**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members C. A. Ballentine and I. M. Stamp.

**APPEARANCES:** *L. Richmond, P. Murphy and J. McKinnon for the applicant; S. C. Bernardo and Josephine Dikken for Kenty County Contractors, a Division of 504961 Ontario Limited; S. C. Bernardo and Bob Nicli for Elgin Construction Company Limited; Michael P. O'Dea for the objectors.*

**DECISION OF THE BOARD:** April 26, 1983

1. This is an application for certification in the construction industry in which the applicant has requested the Board, pursuant to section 1(4) of the *Labour Relations Act*, to treat the two respondents (hereinafter "Kent" and "Elgin") as one employer for the purposes of the Act. The purpose of the union making its companion application under section 1(4) of the Act is to ensure that any certificate granted by the Board in the certification application will be binding upon the employees and activities of Kent and Elgin as if they were one corporate entity.

2. An earlier decision of the Board, differently constituted, directed the Registrar to serve the employees potentially affected by the application with notice by mail. For reasons given in the decision, the Board also directed the Registrar to serve notice by mail on certain persons whom the respondent Elgin claims were employees on lay off at the time the application was made but who nevertheless might have an interest in the outcome of these proceedings. Notice was served on these persons and many of them subsequently filed individual statements of desire in opposition to the application ("petitions").

3. When the matter came on for hearing on March 30th, 1983, the persons who had filed petitions ("the objectors") were represented by counsel. Applicant counsel challenged their status as parties to the proceedings. Counsel's challenge was founded generally on the claim that the persons in question were not at work in the bargaining unit on the date of the application and, therefore, were not to be treated as employees affected by the application.

4. The Board consented to the request of counsel for all parties present at the hearing to deal with the applicant's challenge as a preliminary matter. The Board heard their representations on the issue. At the conclusion of their representations and after consulting with the parties, the Board advised the parties that it would reserve its decision and render it orally at the commencement of hearing the next day, when this proceeding was scheduled to resume.

5. Subsequently, the Board was advised that the parties had agreed to an adjournment of the hearing. Accordingly, this is an interim decision on the status of the persons who have filed petitions in opposition to the application to continue to participate in these proceedings.

6. Applicant counsel contends that, even were the Board to declare that Kent and Elgin be treated as one employer for purposes of the Act, the persons in question who were on lay-off from Elgin when this application was made are not employees in the bargaining unit sought by the applicant. Counsel is relying, in that respect, on the Board's policy in dealing with certification applications in the construction industry for deciding who is an employee for purposes of determining the applicant's membership support. In order to be included, the policy requires a person to be at work *in the bargaining unit* on the date of the application. That being the case, counsel argues, the objectors can have no effect on the "count"; in other words, on whether the applicant has the requisite membership support for its application to succeed. For the same reason, he contends, they have no other legal interest in the proceedings and, therefore, lack status to be parties to the proceedings for any purpose.

7. Objectors' counsel, on the other hand, argues that these persons are employees of Elgin who were on lay-off at the time of the application because they had been laid off at the end of Elgin's construction season. They expected to be recalled, in keeping with Elgin's practice, as soon as it had work in the spring. Elgin and the objectors both assert that to be Elgin's practice and that some of its employees have been with the firm for 25 years. Objectors' counsel submits, therefore, that the laid off Elgin employees would be affected by the application for certification if the Board were to treat Kent and Elgin as if they were one employer. For that reason, counsel contends, the objectors are parties entitled to participate in these proceedings for all purposes. He also contends that, even if the Board found them not to be employees for purposes of the county, they would still be entitled to make submissions with respect to the section 1(4) application and the build-up issue. Determination of the section 1(4) application involves the question of whether the Board should exercise its discretion under that section to declare that Kent and Elgin be treated as one employer. The exercise of that discretion, counsel argues, would have a direct impact on the objectors.

8. Whether the applicant's claim that the objectors have no status to intervene in these applications will succeed depends on the application of several Board policies: for example, its policy for determining who are employees in the bargaining unit in a construction industry certification application; its build-up policy and whether it should be applied here having regard for the Board's discretion pursuant to section 119(2) of the Act to disregard build-up in a construction industry application; and, its policy with respect to who are the core group of employees if the Board allows the build-up claim and directs a representation vote. While the Board does not readily depart from the application of these policies, it would at least hear submissions on whether it should depart from them.

9. If both applications succeed, both Kent and Elgin automatically would be bound by the labourers provincial agreement in the industrial, commercial and institutional sector of the construction industry. If Elgin was to perform work in that sector, the provincial agreement might deprive these persons from being recalled. On

the other hand, if Elgin was to do work in any of the other sectors while the section 79 freeze was applicable, the objectors might have recall rights enforceable under section 79 of the Act. They would be employees under the Act at least for determination of that issue.

10. Finally, according to objectors' counsel, there is the possibility that two of the objectors were at work for Elgin on the date of the application who may be affected by it.

11. In these circumstances, it might not be possible for the Board to make a proper and final determination of the status of those two persons in particular and the objectors generally until it has heard and considered as well the evidence and representations of the parties with respect to the alleged section 1(4) relationship between Kent and Elgin and the build-up issue. Since all of these issues are related, the Board should hear them and defer deciding the status of the objectors until it has heard all of the evidence and representations of the parties.

12. Therefore, the Board will reserve its decision on the status of the petitioners until such time as it has heard the relevant evidence and representations of the parties. In the meantime, the persons who have duly filed petitions may participate in the proceedings and be represented by agent or counsel for that purpose.

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**0806-82-M Kingston General Hospital, Applicant, v. Ontario Nurses' Association, Respondent**

Employee – Employee Reference – Certificate and series of collective agreements including head nurses in unit – New position of “unit supervisor” created and filled by former head nurses – Managerial authority in job descriptions not exercised – Unit supervisors not managerial

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members E. J. Brady and S. Cooke.

**APPEARANCES:** *R. A. Little, Q.C., Brenda Snider, Donald Halpert, Steven Knox and M. J. Milligan for the applicant; no one appearing for the respondent.*

**DECISION OF THE BOARD;** April 13, 1983

1. This is an application under section 106(2) of the *Labour Relations Act* in which the applicant Hospital has raised a question concerning the “employee status” of some 26 persons it classifies as “unit supervisor”. The Hospital contends that the individuals involved are “managerial” and thus not “employees” under the Act. The respondent trade union contends that they are employees. The relevant provision of the Act reads as follows:



"1(3)(b) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

• • •

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations."

2. The respondent trade union was certified to represent registered and graduate nurses in the employ of the Hospital on May 5, 1971. During the course of the certification proceedings the Hospital took the position that "head nurses" in its employ exercised managerial functions and hence were not employees under the Act. After an inquiry into the issue, the Board concluded that head nurses did not exercise "that quality of supervision, control and independent discretion necessarily incidental to the exercise of managerial functions within the provisions of section 1(3)(b) of the Act." In the result, head nurses were included in the bargaining unit for which the trade union was certified.

3. Subsequent to the union's certification, the union and the Hospital entered into a series of collective agreements which encompassed head nurses within the bargaining unit. Early in 1981 the Hospital reorganized its nursing department and introduced the new classification of "nursing supervisor". At the same time some 26 head nurse positions were "eliminated". (Six remaining head nurse positions in the operating room were left untouched). It appears that all of the unit supervisor positions were filled by individuals who had formerly been classified as head nurses. Prior to the reorganization, each head nurse reported to one of the hospital's six clinical supervisors. The clinical supervisors in turn reported to an Associate Director of Nursing Service and a Director of Nursing Service. At present, each unit supervisor reports to one of four associate directors. On the same "level" as the unit supervisors are an associate director of staffing and the operating room supervisor, to whom presumably the six head nurses in the operating room report. At the top of the nursing department is the director of nursing. To summarize then, there is currently a director of nursing and immediately below her four associate directors. The union does not dispute that the director and the four associate directors exercise managerial functions. Below the associate directors are the 26 "unit supervisors" whose status is the subject matter of this application. These unit supervisors occupy a position in the hierarchy similar to that occupied by the "head nurses" they purportedly replaced.

4. As did the head nurses previously, each unit supervisor has responsibilities for a "unit" or "floor" in the hospital. The units range in size from 8 to 41 beds, although the average is somewhere between 20 and 25. The evidence before us does not reveal the staff complement on each of the units. However, the evidence is that on one 20 bed unit, when the unit director is on duty there is a total of 14 regular staff, namely, four full time and two part time registered nurses, three registered nursing assistants, four orderlies and a ward clerk.

5. When the unit supervisor classification was established in 1981, the Hospital took the position that it was a new classification which did not fall within the



bargaining unit covered by the existing collective agreement with the trade union. This position prompted the union to file two grievances touching on the matter. The two grievances both came before a board of arbitration chaired by Mrs. Gail Brent for determination. After a review of the work formerly performed by the head nurses and the work being performed by the unit supervisors, a majority of the arbitration board concluded that there had not been a substantial quantitative change in duties between the new positions. The majority then went on to state that “the Head Nurse classification has been re-named Unit Supervisor rather than that a new classification has been created”. It followed from this finding that unit supervisors remained within the bargaining unit set forth in the collective agreement.

6. In the course of the arbitration board’s award that board noted that its jurisdiction flowed only from the collective agreement between the parties, and that accordingly, its role was limited to a determination of whether or not the unit supervisors fell within the bargaining unit described in the agreement. The arbitration board expressly stated that it was not making a determination as to whether or not the unit supervisors were employees under the *Labour Relations Act*. The arbitration board issued its award on October 19, 1981. On July 27, 1982, the Hospital filed the instant application asking this Board to decide whether or not the unit supervisors are employees for the purposes of the Act.

7. The Hospital and the union met with a Board Officer on October 26, 1982. At that meeting they reached agreement that the evidence of Miss Linda Morgan would be considered representative of the duties and responsibilities of all 26 unit supervisors. Miss Morgan gave her evidence before the Board Officer and the Hospital also called as a witness Miss Brenda Snider, the Director of Nursing. The Board now has before it a transcript of the evidence of both Miss Morgan and Miss Snider as well as written representations from both parties concerning the conclusions the Board should reach on the basis of this evidence. The Board also heard oral representations from counsel for the Hospital at a hearing requested for that purpose by the Hospital.

8. Section 1(3)(b) of the Act is meant to exclude from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons within a bargaining unit do not find themselves faced with a conflict of interest between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm’s length relationship between the “two sides” whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor the employer and its management team, need be concerned that its members will have “divided loyalties”. This purpose was expressed as follows by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby* [1974] 1 Can. LRBR at page 3:

“The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm’s length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes

a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management – on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for “cause” or passed over for promotion on the grounds of their “ability”. The employer does not want management’s identification in the activities of the employees union. More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm’s length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.”

9. The *Labour Relations Act* does not contain a definition of the term “managerial” nor are there any specified criteria to guide the Board in reaching its opinion. Accordingly, the task of developing such criteria has fallen to the Board itself. In instances of so called “first line” managerial employees, the principal criterion utilized by the Board is the extent to which they make decisions which affect the economic lives of their fellow employees and thereby raise a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline

employees are all manifestations of managerial authority, which the Board views as being incompatible with participation in trade union activities as an ordinary member of the bargaining unit. The Board also recognizes that in certain enterprises there are individuals whose nominal authority appears to be limited to the making of recommendations, but where because of the circumstances involved it can reasonably be said that they are the ones who make the effective decision. The Board has characterized this as a power of “effective recommendation”. Where such effective recommendations can affect the economic well-being of fellow employees, the Board has viewed the inclusion of the persons who make such recommendations in the bargaining unit as potentially giving rise to the very kind of conflict of interests that section 1(3)(b) was designed to avoid. Accordingly, persons making “effective recommendations” of this kind are viewed as part of the “management team”, and are excluded from the bargaining unit. In recognizing, the importance of “effective recommendations” the Board has not lost sight of the real distinction between a person recommending or influencing a decision, and the one ultimately making it. Supplying “input” into a decision is not the same as actually making the decision.

10. Increasingly the Board has been asked to determine where the management line is to be drawn in situations involving technical and professional employees where the bargaining unit members are generally highly trained and largely self-motivated. Every employee in this type of situation is generally capable of, and indeed expected to, exercise independent judgement and to perform his or her duties with a minimal of direction. The Board discussed the status of such employees in *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84 as follows:

“Persons who exercise skills which have been acquired through years of training or experience will necessarily have considerable influence over those who are less trained or experienced. The most highly trained or skilled employees will routinely supervise the work of others, and it is part of their normal job functions to train and direct such persons, and to instill good work habits. Frequently, it is only the most senior or experienced employees who will fully understand the technical requirements of the job and, accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. It is part of their job to ensure that appropriate techniques are being applied and that the work is being done properly. Their expertise and technical judgement are an integral part of the group effort. In such circumstances, it is inevitable that they will have a special place on the “team” and will have a role to play in co-ordinating and directing the work of other employees – but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining. To adopt so rigid a view would deny thousands of skilled or professional employees the right to engage in collective bargaining, simply because they typically work in semi-autonomous work groups which include a variety of individuals with lower levels of skill, education or training (in the case of “master craftsmen”, “apprentices”, and assorted “helpers”;



and in the case of “professionals”, a variety of “technologists”, “technicians”, assistants and aides). To hold that persons with higher levels of education or training (whether required on the job or otherwise) exercise “managerial functions” with respect to lesser skilled or unskilled individuals at lower levels of the job hierarchy would be tantamount to saying that the Act has no application to much of the highly trained and educated work force which is characteristic of the emerging high technology industries. This is not to deny that professional or technical employees may also exercise “managerial functions” within the meaning of section 1(3)(b). It is simply that the focus should be upon those functions which have a direct and provable impact (positive or negative) upon the terms and conditions of employment of the alleged subordinate employees. It is that kind of function which raises the “collective bargaining” conflict to which section 1(3)(b) is addressed, and it is this collective purpose which must be kept in mind when the Board is exercising the broad authority granted to it under section 1(3)(b), and is forming its “opinion” in particular cases.”

11. The considerations expressed in the *Oakwood Park Lodge* case are particularly relevant to the nursing profession. Indeed, since nurses were one of the first professional groups to become extensively organized, most of the Board's cases in the area of professional workers have involved nurses, and in particular whether or not the nurses “in charge” of a hospital ward were persons who exercised managerial functions. In most cases, the nurses involved were classified as “head nurse”, although a variety of other terms were also employed. In that different hospitals have different managerial structures and have given different degrees of authority to their “head nurses” it is not surprising that the results in the various cases that have come before the Board has not been uniform. In a number of cases the Board concluded that sufficient real decision making and authority had been vested by the hospital in its head nurses such as to justify a conclusion that they were not “employees” for the purposes of the Act. In at least one case, *Westmount Hospital* [1981] OLRB Rep. May 593, the Board concluded that notwithstanding an earlier Board decision some years previously to the effect that head nurses were “employees”, the hospital involved had made sufficient changes in their duties and responsibilities as to make their inclusion in the bargaining unit no longer appropriate. In the majority of cases that have come before the Board, however, the Board concluded that the duties actually performed by the “head nurses” were not sufficient to make them managerial. Perhaps typical of these decisions was the *Peterborough Civic Hospital* case [1973] OLRB Rep. March 1521 where the Board described many of the duties of the head nurse in that case as follows:

“Head nurses stand at the very boundary between the employee group and management. The head nurse in this particular case is indicative of the role usually played by head nurses. Head nurses form a link or a liaison between management and other employees; they are in charge of a hospital floor and therefore assume many different functions. For example, a head nurse is still involved in



patient care. Because of her experience she may be called upon by other nurses prior to consulting the doctor. She may also be required to assist in the orientation of nurses who are new to that particular floor. Neither of these roles is a management function, but is merely the function of the training and experience of head nurses. In addition, the head nurse carries out limited administrative duties. For example, she co-ordinates the policies of the hospital on her floor with respect to staffing. She sees that the scheduling and arranging of personnel is such that there is adequate coverage for patients. This scheduling is carried out in correspondence with a predetermined policy and the head nurse is merely implementing policies decided at a higher level. This implementation should not be confused with the decision-making or control function that goes hand in hand with management.

Also, the head nurse forms a conduit between the general staff on her floor and management, or to put it another way she has a reporting function. In this function she is a liaison between management and other employees; she enables management to "keep its ear to the ground" and in touch with the daily operations and functions of the hospital, and at the same time she is a part of the vehicle for management to convey policies and decisions to other employees. Again, this reporting function should not be confused with the exercise of managerial duties. The duty to manage and the concept of a managerial function requires a corresponding and correlative responsibility. The head nurse in this case does not have the type of responsibility that one envisions as being managerial. She is not akin to the early foreman that we have spoken about, nor does she have duties that are incompatible with placing her in the bargaining unit. There is no conflict between the duty that she owes to management and her being a member of the bargaining unit. Again in this case, as in the *Ajax and Pickering General Hospital* case, *supra*, her very limited role indicates that she is not a member of management. For example, if an employee wants time off in excess of one hour the head nurse must consult her supervisor. Surely, if she were management she would have a greater hand in awarding time off. The type of limited responsibility permeates other areas as well and in our view her lack of responsibility indicates that she is not part of the management team."

12. The *Oakwood Park Lodge* case, (*supra*) contains a lengthy review of many of the hospital and nursing home "head nurse" cases. The Board concluded that the general thrust of these cases was as follows:

"Each case, of course, turns on its own facts, but their general thrust is the same: supervisory, coordinating, reporting, consulting and minor admonitory functions were not, in the opinion of the Board, (and in the context of this industry) considered to be

“managerial functions”. They did not signify the kind of effective control or authority over the employee and his employment relationship which justified exclusion pursuant to section 1(3)(b).”

13. The “Job Description” drawn up by the respondent Hospital with respect to the unit supervisors appears to give to them very extensive authority, including “correcting unsatisfactory work performance, counselling staff, taking disciplinary action where necessary, terminating employment if necessary”. The description also lists as one of their duties: “Participating, on behalf of the Hospital in union negotiations, including consultations to assist in the development of the bargaining position for the Hospital and representing the Hospital on the bargaining committee”. If these and the other duties listed on the job description were in fact exercised by the unit supervisors, we would have no hesitation in finding the unit supervisors to be persons who exercise managerial functions. There is no question that the job description indicates that the unit supervisors have a real and independent decision making authority which would be incompatible with membership in the bargaining unit. However, the evidence of Miss Morgan relating to what she actually does and her relationship with one of the associate directors indicates a role very different from that set out in the job description. (It might be noted that this difference between the duties set out in the job description and the duties actually performed by the unit supervisors was also commented on by the board of arbitration). We were not given any explanation as to why Miss Morgan’s actual duties do not more closely coincide with the job description.

14. Miss Morgan does have some involvement in the “hiring” of staff. According to Miss Morgan, on two occasions when job vacancies were posted, she received the list of candidates for the positions. We assume from her reference to a posting that the job applicants were employees of the Hospital who were seeking to transfer into the vacancies from other hospital jobs. After reviewing the personnel files of the applicants, Miss Morgan first selected those she wanted to interview, and then chose the candidate she felt to be most appropriate. In both instances her next step was to get Mrs. A. Rajan, an associate director, to verify her choice. There was another occasion when there was a vacancy for a registered nurse on Miss Morgan’s unit. Miss Morgan played no role in filling the vacancy. Rather a nurse was hired from the “outside” by the associate director of staffing. Miss Morgan saw this nurse for the first time when she arrived on the unit for her orientation.

15. Miss Morgan is responsible for supervising the nursing staff on her unit. To this end she ensures that the nurses are performing their tasks properly and if they are not doing so she advises them as to how to do it correctly. Miss Morgan does some “hands on” nursing, particularly when things are busy. If a nurse has a difficult dressing to do which she has not previously performed, Miss Morgan will do it for her while showing her how it is done. Miss Morgan makes work assignments using patient needs as the criteria. In terms of scheduling, the nurses work off a rotating master schedule. Miss Morgan has at times altered the rotation in consultation with Mrs. Rajan, the associate director. It appears that at least once a day Mrs. Rajan will come to the unit to be briefed about recent developments by Miss Morgan.

16. When additional staff is required for her unit Miss Morgan notifies the staffing office, which in turn ensures that part-time staff is made available. Miss Morgan has on a number of occasions scheduled staff for overtime work, but on about half of these occasions her decision has been overturned by the nursing office. The longest Miss Morgan has given an employee time off with pay has been for a couple of hours. On one occasion she did purport to grant an employee a six month leave of absence without pay, but this was later rescinded by the director of nursing.

17. Miss Morgan does an evaluation of regular staff, apparently once a year. In that wage increases are automatic under the collective agreement, the evaluation does not have any direct impact on employee wages. Indeed, the evidence is not at all clear as to impact these evaluations have on other employees. Miss Morgan indicated that if there is a problem with an employee's evaluation, she will inform the associate director about it ahead of time. Miss Morgan also does an assessment of probationary employees, however she discusses these evaluations with the associate director before completing them.

18. Notwithstanding the wording of the job description, Miss Morgan has not played any role in negotiations, or provided any input into the Hospital's bargaining proposals. She did have the collective agreement explained to her by Mr. Knox, a management official, but only after it had been negotiated. The first step of the grievance procedure in the Ontario Nurses' Association collective agreement calls for a nurse to submit a grievance to her "immediate supervisor". Although this has not yet happened, Miss Morgan believes that she would be the person to receive the grievances. It is clear, however, that Miss Morgan plays no direct role in the grievance procedure affecting orderlies and registered nursing assistants employed on her unit.

19. Miss Morgan has an input into the setting of the budget for her unit, but she does not make any final decisions in this regard. Miss Morgan indicated that she might request five wheelchairs but get two. She also stated that if she makes a case for a 7 percent allowance for sick time (as opposed to a projected 2.5 percent allowance), she might end up with a 5 percent allowance. Any staffing or supply costs which exceed the amount budgeted for them must be accounted for by Miss Morgan.

20. In terms of discipline, Miss Morgan has not gone beyond the giving of verbal warnings without first consulting Mrs. Rajan, the associate director. In Miss Morgan's own words:

"... If you're going to go further into a written warning or suspend someone you would discuss that with the associate director for your area. And, of course, anything like a termination would be discussed with an associate director and with personnel."

Miss Morgan has issued two or three written warnings in consultation with the associate director, and has also imposed a ten day suspension after discussing the matter with the associate director and the Hospital's employee relations manager, who was the one who suggested the ten day suspension. With respect to the written warnings, Miss Morgan made the following comment.

“Usually what I do is decide that the written warning is the next step to take and then I would review the situation with the associate director and get her input and then go to the written warning unless she objected (which she has never done)”.

21. From the evidence, it appears that generally before Miss Morgan takes any action which might impact on other employees, she clears it first with Mrs. Rajan, the associate director. Mrs. Rajan appears never to have objected to anything which Miss Morgan has proposed (although others have done so with respect to planned overtime and the proposed six month leave of absence). This situation does not strike us, however, as one where Miss Morgan makes a decision and it is routinely approved by Mrs. Rajan. Rather it appears that Mrs. Rajan, who is kept informed of developments in the ward, puts her mind to what Miss Morgan has proposed, and then makes her own decision as to whether or not Miss Morgan’s proposal is a correct one.

22. The individuals whose status is in dispute have been included in the bargaining unit for some ten years. As the Board indicated the *Corporation of the City of Thunder Bay* case [1981] OLRB Rep. Aug. 1121, a party seeking to remove individuals from a bargaining unit must be able to provide a firm evidentiary foundation for its position. With respect to Miss Morgan, however, there is little concrete evidence before the Board of the kind of actual conflict of interest to which section 1(3)(b) is directed.

23. When all of the above matters are considered, we are unable to conclude that Miss Morgan exercises the type of real decision making that would make her a person who exercises managerial functions. In the result we are of the opinion that Miss Morgan, and the other unit directors, are “employees” for the purposes of the *Labour Relations Act*.

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**1082-82-R Brenda Millward, Lilian McFarland, Applicants, v. Service Employees Union, Local 204 A.F.L., C.I.O., C.L.C., Respondent, v. K Mart Canada Limited, Intervener**

**Petition – Practice and Procedure – Termination – Employees shown blank termination application form prior to signing petition – Signatures obtained on blank paper with no preamble – Board distinguishing prior decisions rejecting “blank” petitions signed after oral explanation of purpose – Petition and termination form accepted as signification “in writing”**

**BEFORE:** Corinne F. Murray, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

**APPEARANCES:** *Barry Edson, Brenda Millward and Beverly Wilkinson for the applicants; H. Goldblatt and A. Edge for the respondent; Robert A. MacDermid and C. A. Cumiskey for the intervener.*

**DECISION OF CORINNE F. MURRAY, VICE-CHAIRMAN AND BOARD MEMBER J. A. RONSON; April 8, 1983**

1. This is an application for a declaration terminating the bargaining rights of the respondent pursuant to section 57(2)(a) of the *Labour Relations Act*. In a previous interim decision of the Board (November 8, 1982), the Board found that the bargaining unit in respect of which this application was made was the appropriate one, namely:

All employees of the employer employed at its K Mart store at Bayview Village Shopping Centre in the Municipality of Metropolitan Toronto, Ontario, save and except department managers, persons above the rank of department managers, management trainees, pharmacists, students employed during the school vacation period and persons who are regularly employed for not more than twenty-four (24) hours per week. The Board also found the application to be timely and the petition containing the names of over 50 per cent of the employees in such bargaining unit. Following its interim decision, the Board convened this hearing to hear evidence *in writing* that the signatories no longer wished to be represented by the respondent.

2. The issue in this case is not whether there has been management influence upon the petition. The respondent did not suggest or allege there was management support or involvement in the preparation and circulation of the petition. The issue is whether the form of the petition itself is such that the Board can conclude the signatures of the employees on the petition were signification in writing of their desire to no longer have the respondent represent them. The petition (a paper measuring 6½" × 8") consists of a parallel list of twenty-eight signatures with twenty on one portion and eight on the other portion of one side of it. There is at the base of all the names the following hand printed words:

“The above employees have signed freely on termination of union 204 at K Mart 5417”.

Ms. Millward testified that when the employees signed the petition it did not contain these words. She added them, in circumstances which will be described below, after all the signatures were affixed. Under the column containing eight names just above these hand-printed words are the following words:

“Witness [sic] by”

under which appear the signatures of Ms. Wilkinson, Ms. Smyth and Ms. Millward. Alongside this are listed three dates (handwritten) of August 30, 1982, September 3, 1982 and September 7, 1982.

3. The only evidence called was by the applicants. The applicant's claim that the reason they started the petition is because they and other employees in the bargaining unit were unhappy with the respondent's handling of a ratification vote on August 29, 1982. The applicant, Millward, and Marie Smyth, and one of the other two witnesses called in support of the application, acknowledged that they were opposed to the respondent prior to the ratification vote of August 29, 1982. During the proceedings which resulted in the respondent being certified on September 10, 1981, Ms. Millward attempted to file with the Board a petition containing signatures of employees opposing the respondent's certification but was unsuccessful because of insufficient names. Ms. Smyth said she opposed the respondent “since it started” which we took to mean the beginning of its organizational efforts at the intervener's Bayview Village store.

4. Ms. Millward and Ms. Smyth testified that following certification of the respondent, a group of between fifteen to eighteen employees held numerous luncheon and evening meetings at various employees' homes to consider what action they could take regarding the certification. Apparently the group resolved to try to remove the union at the earliest opportunity and to this end raised money through raffles and selling donated lunches and dinners in their homes so that legal assistance could be obtained. All contributors and donors apparently were the employees in the bargaining unit.

5. The event which allegedly precipitated the petition's preparation and circulation was a ratification meeting of August 29, 1982 called by the respondent to allow the employees in the bargaining unit a second chance to vote upon a proposed collective agreement the respondent had negotiated with the intervener. The first time the respondent put a proposed collective agreement to a ratification vote was in June of 1982. The result of it was a vote of twenty-five against ratification and twenty-four in favour. Prior to the votes being cast for a second time on the same proposed contract on Sunday, August 29, 1982, Mr. A. Edge, Business Agent for the respondent, was asked by an unidentified employee what would happen in the event of a tie vote. Mr. Edge responded to the effect that “the union would be out”. The secret ballot vote was a tie (24/24). Mr. Edge told the assembled employees that he had to phone a Mr. Roscoe. After having left the room for a short while and returned, Mr. Edge announced that he was taking it upon himself to “vote it (the contract) in”. The collective agreement which came into effect as a result was for a term of one year with a termination date of September 10, 1982. At least Marie Smyth knew that the time for making an application for decertification was short in these circumstances.

6. A group of approximately 10 – 15 employees who had attended the meeting of August 29, met at a coffee shop the same day following the meeting. Ms. Millward,

Ms. Smyth and Beverly Wilkinson, the third witness called by the applicants were there. All three said they were mad at what had been done by Mr. Edge. Apparently, prior to going to the coffee shop, there was a brief discussion in the parking lot outside the premises where Mr. Edge had conducted his meeting. The employees gathered there discussed Mr. Edge's suggestion that they could "appeal" his action. The employees gathered in the parking lot also discussed whether they should go down to the Labour Board to get "decertification documents".

7. As a result of these discussions on August 29, 1982, Ms. Millward, Ms. Wilkinson and one Gladys Hogan came down to the Board the next morning at 8:30 a.m. and talked to someone on the third floor about their intentions. The witnesses could not accurately recall the name of the individual they spoke with. Ms. Wilkinson said that this individual advised them to go to 1 Credit Union Drive (the respondent's office) write out a complaint about how the ratification vote was held and give this complaint to Mr. Roscoe. Both Ms. Wilkinson and Ms. Millward claimed that he responded to their request as to how to go about decertifying the union by giving them three books: the Labour Relations Act, the Regulations, and the Guide to the Labour Relations Act. He gave them in addition four copies of Form 17 and he told them to take the Form 17 and let the employees know that it was a decertification form. He is alleged to have advised them that if there was not enough room on the form for the names of all the employees then another piece of paper should be used. The witnesses claimed he told them to be sure the employees saw the Form 17. They denied that he ever told them to write anything on the additional paper necessary for names. The Form 17 has the heading APPLICATION FOR DECLARATION TERMINATING BARGAINING RIGHTS. After a space for the parties' names the body of the document states:

The applicant applies to the Ontario Labour Relations Board under section (57,58,59 or 60) of the Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

The applicant states:

1. (a) address of applicant:  
     (b) address of applicant for service:  
     (c) address of respondent:
2. (a) name of employer of employees affected by the application:  
     (b) address of employer:
3. Detailed description and geographic location of the unit of employees for which the respondent is the bargaining agent, including the municipality or other geographic area affected:
4. Approximate number of employees in the unit described in paragraph 3:
5. Other relevant statements (attach additional pages if necessary):



At the base of Form 17 there is the following paragraph:

(Where the application is made under section 57 of the Act.) The applicant submits with the application the document or documents by which employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the respondent.

Page 48 of the Guide states under the question:

How do employees apply to terminate a union's bargaining rights?

The application is made on Form 17, four copies of which must be filed with the Ontario Labour Relations Board. The application under section 57 must be accompanied by a petition signed by at least 45 per cent of the employees in the bargaining unit indicating that they no longer wish to be represented by the union.

8. Sometime later on Monday, August 30th, Ms. Millward and Ms. Wilkinson went to the respondent's offices and submitted a written complaint to a Mr. LaLiberty about how Mr. Edge had conducted the ratification meeting. Mr. LaLiberty indicated to them that he would notify them as to a meeting which would be held regarding the matter two weeks from then, approximately September 10, 1982. No evidence was given as to whether any meeting did take place or what the result of the appeal was.

9. Meanwhile Ms. Millward and Ms. Wilkinson continued their pursuit of decertification. Ms. Smyth joined Ms. Millward and Ms. Wilkinson in signing other employees up. Ms. Wilkinson had custody of the petition at all times until it was delivered by Ms. Millward to the Board office on September 8, 1982. Either Ms. Millward or Ms. Smyth were with her at all times when signatures were being obtained. Ms. Wilkinson saw all twenty-eight employees sign the petition. There was much confusion and lack of certainty about the precise dates, times and location of obtaining signatures. The evidence of the applicants is that each employee who signed the petition was shown a blank copy of Form 17 prior to signing. All the signatures were obtained prior to or after work, or on lunch or supper hours. All signed in various locations outside of the intervener's store. For some of those signing (between 9 – 13 who had attended the coffee shop conference of August 29, 1982) little explanation of what Form 17 and the petition meant was necessary. Twenty-six of the twenty-eight who signed the petition had attended the ratification meeting of August 29, 1982. The employees were alerted to the opportunity for them to sign a petition for decertification by "word of mouth" either using the telephone or personally.

10. The petition was delivered together with a completed Form 17 to the Board by Ms. Millward. She testified that she added the words "the above employees have signed freely in termination of union 204 at K Mart 5417" at the base of the petition because someone at the Board would not accept it without some sort of "heading". She readily acknowledged that the words were added after all the other writing and signatures were on the petition because of the insistence of an unidentified person at the

Board who she spoke with on the day she filed the application. She stated that she had, when circulating the petition opposing the certification of the union, written a heading to this effect prior to obtaining signatures but she did not write one on the decertification petition until she was so advised by one of the Board's personnel.

11. Section 57(3) provides:

57.-(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

Section 73 of the Board's *Rules of Procedure*, R.R.O. 1980, Reg. 546 sets out what the Board will accept by way of evidence in an application for a declaration terminating bargaining rights. The primary evidence of signification of a wish to no longer be represented by a union is evidence in writing and any oral evidence can only be accepted by the Board if it is to identify and substantiate the written evidence. The relevant portion of section 73 is:

73.-(1) Evidence ... of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application ... for a declaration terminating bargaining rights *unless the evidence is in writing*, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) *No oral evidence ... of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).*

• • •

(4) An employee or group of employees who has filed a statement of desire in the form and manner required by this section

may appear and be heard at the hearing ... in person or by a representative.

(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence *that includes* testimony in the personal knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

(emphasis added)

12. Counsel for the applicants argued that the Board ought to consider the petition in conjunction with Form 17 as sufficient evidence in writing of the desire of the employees who signed the petition to oppose the union. He relied on the evidence of the longstanding opposition the three witnesses had to the respondent and the fact that there had been numerous meetings at employees' homes even prior to August 29th, where plans for the decertification application and hiring a lawyer were discussed. This together with evidence of Mr. Edge's conduct on August 29, 1982 ought to lead the Board to the conclusion that the petition expresses the true wishes of the employees that the respondent be decertified. The explanation for the lack of any heading or preamble on the petition is that the person Ms. Millward and Ms. Wilkinson spoke to at Board offices on Monday, August 30th never indicated to them such a thing was necessary. The circulators of the petition utilized Form 17, which had been given to them by this person by showing it to the eighteen prospective signatories. Counsel for the applicants cited no cases to support his reasoning but distinguished this case from other cases where the Board has rejected petitions which contained no heading at the time signatures were affixed to the petition.

13. Counsel for the intervener cited *O.H.A. Blue Cross*, [1980] OLRB Rep. Dec. 1759 at p. 1769 in support of the proposition that the Board must adjudge the "ostensible wishes" of the employees from the direct sponsors of the petition and the circumstances. He submitted that in these circumstances the blank Form 17 and the signatures are sufficient evidence in writing. He indicated that were it not for the decision in *Re Fisher et al; and Hotel, Clerks, and Restaurants, Tavern Employees' Union, Local 261 et al.*, (1980) 28 O.R. (2d) 462 revg. [1979] OLRB Rep. May 395, in all probability the Board would not have even heard the evidence regarding the obtaining of signatures on the petition. This particular inquiry reveals no evidence from which to conclude either management involvement or that employees did not understand what they were signing. Therefore, the Board should uphold the petition as a voluntary signification in writing of more than forty-five per cent of the bargaining unit and order a vote pursuant to section 57(3).

14. Counsel for the respondent agreed with counsel for the intervener regarding the change in Board procedure that has been wrought by the *Fisher* decision, *supra* but



he cited numerous decisions of this Board pre-dating *Fisher* (*N.D. Applegate Ltd.*, [1963] OLRB Rep. May 104, *Bennett & Wright Ltd.*, [1965] OLRB Rep. Nov. 514; *Preslund Iron & Steel Ltd.*, [1966] OLRB Rep. Feb. 817; *Bayle – Midway Canada Ltd.*, [1966] OLRB Rep. Dec. 607; *Wilson – Monroe Co. Ltd.*, [1973] OLRB Rep. Dec. 647; and *U.B.A. Chemical Industries*, [1975] OLRB Rep. March 198), which in his estimation stood for the proposition that all “blank” petitions were seriously flawed because, even with an explanation, they did not indicate signification of opposition to the union in writing. While conceding that the *Fisher* decision required the Board to hear explanations for flawed preambles or headings to petitions, the underlying rationale for their rejection has not been changed, i.e., their unreliability as evidence of the wishes of the signatories. In the wake of the *Fisher* decision the respondent contended that only in circumstances where the evidence is “letter perfect”, i.e., where the originators and circulators did not contradict themselves at every turn but gave a credible explanation, could the Board act on evidence explaining a defective petition. He claims that there were such serious contradictions in the evidence as to not amount to an explanation at all. Alternatively, he claimed that the petition, even if it had been in proper form, had not been orally substantiated, in any event, in compliance with Rule 73.

15. In the past the Board has rejected so-called “blank” petitions even where it has evidence that there were oral explanations given to each signatory as to the use of which his or her signature would be put. This is so because obtaining signatures on the basis of oral explanations is “a suspicious procedure inherently incapable of satisfying the Board that the petition accurately reflects the voluntary and true wishes of the employees involved” (see *UBA Chemical Industries*, [1975] OLRB Rep. March 198). This is, no doubt, the same rationale behind the stipulation in section 57(3) of the Act that the petitioners produce evidence in writing of signification by them that they no longer wish to be represented by a trade union.

16. The facts of this case raise the question of whether Form 17, together with the petition, constitute an expression “in writing”. We think that the wording of Form 17 makes it clear the purpose for which the signatures are being obtained and the use of it in this way does not suffer from the inherent liabilities of a “blank” petition explained orally to signatories. All of the decisions the respondent cited were situations where the purpose of the petition was orally explained to the signatories. In *Bennett & Wright*, [1965] OLRB Rep. Nov. 514 the Board indicated at pages 514–515 that because the petition contained no preamble at the time it was signed, “there was nothing on any of the sheets containing signatures and there was nothing before any of the signatories at the time the sheets of paper (i.e. petition) were signed to indicate the intention or purpose of the signatories signing them”. In this case there was something before the employees which indicated what was the purpose of their signatures – one of the Board’s own Forms. The decisions where the Board has rejected oral explanations as proper signification of opposition to the trade union are therefore distinguishable on the facts.

17. In considering evidence where written specification of opposition to the union is unconnected with the document containing the signatures of employees, obviously the Board must make determinations about credibility. In this case, based upon the demeanour of the witnesses and the history of events regarding certification and negotiations, we have found that the signatories to the petition were in fact shown

Form 17 and therefore knew the purpose of their signing the petition. The confusion of the witnesses regarding precise dates, times and locations of obtaining the signatures on the petition was due to an obvious lack of preparedness for the experience of describing to us how, when and by whom the petition was originated and circulated rather than to a lack of honesty or candour.

18. For all these reasons the Board finds that the applicants have produced evidence which indicates more than forty-five per cent of the employees in the bargaining unit at the time the application was made have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of September 22, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of making such determination.

19. The Board accordingly directs that a representation vote be taken of the employees of K Mart Canada Limited. Those eligible to vote are all employees of K Mart Canada Limited employed at its K Mart store at Bayview Village Shopping Centre in the Municipality of Metropolitan Toronto, Ontario, save and except department managers, persons above the rank of department managers, management trainees, pharmacists, students employed during the school vacation period and persons who are regularly employed for not more than twenty-four (24) hours per week, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

20. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with K Mart Canada Limited.

21. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER B. L. ARMSTRONG;**

1. On the evidence this application should be dismissed.

2. Brenda Millward, one of the applicants, opposed the union from the outset of the union's organizing drive and circulated a petition during the certification proceeding. She knew at that time that a heading was required for any petition she was circulating to get rid of the union.

3. She testified that she was given a copy of the Guide to the Act and Form 17, an Application for Declaration Terminating Bargaining Rights. She also testified that she read the Guide to the Act and circulated the petition without a heading. She held meetings at her home and at the home of other employees for the purpose of getting rid of the union.

4. The evidence called by the applicants was inconsistent, confusing and misleading. All the signatures on the petition were not proved and a sentence was added at the base of the petition after the signatures were obtained, namely:

"The above employees have signed freely on termination of Union  
204 at K-Mart 5417."

In my opinion, this petition falls far short of the requirements as set out in section 73 of the Rules of Procedure. There was *no* evidence *in writing* of employees who desired to no longer be represented by the union. The only evidence of the employees' desires was the oral evidence given at the hearing, which cannot be accepted by the Board, by reason of Rule 73(2). The application for decertification should therefore be dismissed.

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**2288-82-M** United Brotherhood of Carpenters and Joiners of America, Local 1316, Applicant, v. **Losereit Sales and Services Ltd.**, Respondent

Construction Industry Grievance – Practice and Procedure – Employer not employing complainant's members as required by collective agreement – Raising estoppel as defence – Whether estoppel applying in arbitration cases

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *David McKee and Richard Harkness for the applicant; Martin Addario and Henry Losereit for the respondent.*

**DECISION OF THE BOARD:** April 1, 1983

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*. The parties are in agreement that the Board has jurisdiction to hear and determine this matter. They also agree that in the event the grievance succeeds, the Board will remain seized of the matter for the purpose of dealing with the issue of quantum of compensation in the event that the parties are unable to resolve that matter.

2. Since 1964, the respondent has operated an accoustic and drywall installation business from Kitchener in the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario. The respondent is bound by the current provincial collective agreement (the "Provincial Agreement") between The Carpenters Employer Bargaining Agency and The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (the "Council"). The respondent is currently working on a renovation project at a hospital in Owen Sound, Ontario, and has employed at that site from one to four members of Local 785 of the United Brotherhood of Carpenters and Joiners of America ("Local 785") between January 5, 1983 and March 16, 1983 (the date of hearing of this matter). It was common ground between the parties that Local 785 has jurisdiction in the "Grand River Valley" area (Board Areas 4, 6, and 7) in which Kitchener is located. Owen Sound is located in Board Area 28 (Grey County) which is within the geographical area of the applicant (also referred to in this decision as "Local 1316"), which consists of Board Areas 3 and 28 (i.e., the Counties of Oxford, Perth, Huron, Middlesex, Bruce, Elgin, and Grey).

3. It was also common ground between the parties that unless the respondent can rely upon the principle of estoppel, the respondent, by failing to employ any



members of Local 1316 at the Owen Sound site, has contravened Article 5 of the Accoustic and Drywall Appendix (the "Appendix") to the Provincial Agreement, which provides, in part, as follows:

ARTICLE 5 – UNION SECURITY  
(Special Provision)

(This Special Provision shall replace Article 5 in the master portion of the Agreement.)

(a) (i) The employer agrees to only employ members in good standing of the United Brotherhood of Carpenters and Joiners of America to perform all work, within the Article 19 of this appendix.

(ii) If an employer is a partnership or corporation, not more than one member of the firm shall work with the tools.

(b) All employees covered by this Appendix shall be hired through the offices of the affiliated Local Unions. However, it is agreed that the employer may recall former employees who have worked for the employer within the last six months prior to recall through the affiliated Local Union office, provided the employee is unemployed and registered at the affiliated Local Union office on the date of recall. All employees before commencing work, must obtain a Referral Slip, from the affiliated Local Union or District Council.

(c) Notwithstanding the provisions of Section (b) the employer may transfer the first two key men from one geographical area to a project located in the geographical area of another affiliated Local Union. The next two (2) employees shall be hired from the affiliated Local Union and thereafter one employee from outside the geographical area and one from the affiliated Local Union area, to a maximum of a twelve man crew. An employee who is transferred from one area to another shall be paid the rate of wages in the area from which he was transferred or the rate in the area to which he was transferred whichever rate is the greater. This twelve man crew is defined as six men from outside the geographical area and six men from the affiliated Local Union's area. If the affiliated Local Union in the other area cannot supply sufficient competent workmen, additional employees may be transferred as agreed upon between the employer and the affiliated Local Union in the other area.

It is understood that, if the Local Union or District Council is unable to provide the required competent workmen within two (2) working days, the employer is free to hire such manpower as is available, but such manpower shall, as a condition of employment before commencing work, apply to the affiliated Local Union

having jurisdiction for the job or project where said manpower is working, and shall comply with all the applicable union regulations for membership therein.”

That agreement was signed on August 11, 1982 by The Carpenters Employer Bargaining Agency and the Council, which, together with the United Brotherhood of Carpenters and Joiners of America, has been designated, pursuant to section 139 of the Act, as the employee bargaining agency bargaining all journeymen and apprentice carpenters (other than millwrights) represented by various affiliated bargaining agents including Local 785 and Local 1316. (The E.B.A. was duly notified of this section 124 referral, but did not have a representative in attendance at the hearing of this matter.)

4. The Accoustic and Drywall Appendix to the Carpenters’ 1978-80 provincial agreement contained a provision similar in all material respects to Article 5, as did the Appendix to the Carpenters’ 1980-82 provincial agreement.

5. Local 1316 is a small local with under 100 members. Because of its relatively small size, Local 1316, which once had a full-time business agent, is able to afford only a part-time business agent. Thus its business agent, Richard Harkness, “works with the tools” and “takes time off when a problem arises”. He “polices” the application and administration of the Appendix in Local 1316’s geographical area by referring to Southam Building Reports as a source of information about projects within that area, by attending meetings of the Carpenters’ Western Onatario District Council (which is also an affiliated bargaining agent of the E.B.A.) at which business agents exchange information about projects within that area, by attending meetings of the Carpenters’ Western Ontario District Council (which is also an affiliated bargaining agent of the E.B.A.) at which business agents exchange information about projects within their respective areas, and by using Brian Black, the business agent of Locals 2050, 2222, and 2451 (which supply general carpenters, rather than accoustic and drywall carpenters) to check on jobs in Huron, Bruce, and Grey Counties. He also from time to time receives calls from business agents of other locals advising him that a contractor from one of their areas is performing work in Local 1316’s area. Similarly, Mr. Harkness, who usually knows when men from his Local are going out of town to work within another local’s area, sometimes calls the business agent of another local to tell him that a contractor from Local 1316’s area is performing work in the latter’s area. However, he conceded that such calls are not made as often as they should be.

6. The respondent first signed a collective agreement with the Grand River Valley District Council in 1966. That agreement covered only the Counties of Brant, Norfolk, Waterloo, and Wellington, and was the first in a series of collective agreements between those parties in respect of those counties. It is unclear from the evidence whether the applicant and the respondent were ever bound by a collective agreement covering Grey County prior to the introduction of mandatory province-wide bargaining in the ICI sector. (Article 3(a) of the accoustic and drywall appendix to the 1978-80 Carpenters’ provincial agreement provided: “This Appendix on behalf of its own provisions and on behalf of the provisions in the master portion of the Agreement, extends their scope to be applicable to and effective throughout the Province of Ontario.”) Henry Losereit, the President of the respondent, testified that when the respondent was working on the construction of the London City Hall in 1969 and 1970,

he "signed something" which he "believed to be a collective agreement" with the Carpenters' London Local "in order to get men" to work on that project. Mr. Losereit did not receive a copy of that agreement, nor was a copy of it placed in evidence before the Board in these proceedings. Moreover, there is no evidence before the Board which indicates what the geographic scope of that agreement was. Thus, it is unclear whether it extended to Board Area 28 (Grey County) or was confined to Board Area 3 or a part thereof. However, we are satisfied that the appropriate disposition of this case would be the same irrespective of the geographic scope of that agreement since, in our view, the case turns primarily on events which have occurred since the advent of province-wide bargaining in the ICI sector.

7. Mr. Losereit, whom we found to be a candid and credible witness, told the Board that his company has used carpenters supplied by "out of town" locals on a number of jobs outside of Local 785's geographical area. He explained that this generally came about when a Carpenters' representative came to a site in an area in which the respondent had not previously worked and told management that the respondent was required to use men from the Local which had jurisdiction in that area. After the respondent had thereby "established a working relationship" with such local, it would then call that local to obtain additional men on a basis similar to that set forth in Article 5. Mr. Losereit cited Toronto, Ottawa, Sarnia, Huntsville, and Collingwood as examples of locations in which that had occurred. It was his uncontradicted evidence that he had never been approached by any Carpenters' official about using men supplied by the applicant or by any local other than Local 785 in Oxford, Perth, Bruce, Huron, or Grey Counties (hereinafter referred to as "the five counties"). He told the Board, "We had been working there for eighteen years.... We just carried on. Since no one came around and told us different, we just carried on as before." He further testified that it never occurred to him to use men supplied by the applicant on jobs in those counties because "it makes no sense; economically it's not feasible." Mr. Losereit explained that the travelling allowance payable to men from the London area (in which Local 1316 is located) in respect of work performed on projects in the five counties, such as the Owen Sound hospital site, would be much greater than that payable to men from the Cambridge area, in which Local 785 is located and from which the respondent normally draws its workforce. In addition to the significantly higher travel costs which the respondent would incur by using carpenters supplied by Local 1316 rather than Local 785 on those projects, the "wage and related payments" schedule applicable to Local 1316 provides for higher wages and related payments than does the schedule applicable to Local 785. (The differential is currently \$1.57 per hour). Mr. Losereit also testified that he was bidding against non-union contractors on many of the jobs in five counties, and that if he had allowed for use of workers (supplied by Local 1316) from London in his bids, he would never have been awarded the jobs in the first place.

8. In support of his contention that Local 1316 is estopped from relying on Article 5 in the circumstances of this case, counsel for the respondent submitted that there is a "long established local area practice" in the Kitchener area by which acoustic and drywall contractors in that area have used carpenters exclusively from their "home local" (Local 785) on projects in the ICI sector in the five counties. In support of that contention, the respondent adduced evidence which establishes that it used members of Local 785 exclusively to perform work valued at over \$900,000 involving over 35,000 hours of work on 70 projects in various locations in the five counties from 1966 to 1981, without complaint, grievance or objection from the



applicant, the Council, or Local 785. Eleven of those projects, involving a total of almost 3,300 hours of work projects, involving a total of almost 3,300 hours of work and a total value of about \$107,000, have been performed in the period (from 1978 to 1981) during which the respondent has been bound by contractual obligations similar in all material respects to those contained in Article 5, as set forth above. On each of those projects, all of the carpenters on the respondent's work crews, which have varied in size from two to about twenty carpenters, have been supplied by Local 785. Those eleven projects included not only renovation work but also new construction. Some of that work was subcontracted to the respondent by general contractors bound by the Provincial Agreement, such as Wm. Parker Construction and Traugott Construction, although most of it was subcontracted to the respondent by non-union contractors.

9. The evidence also establishes that Prestige Accoustic Limited, another Kitchener area accoustic and drywall contractor, which has had a collective agreement with the Carpenters since 1967 and is bound by the Provincial Agreement, has used men supplied exclusively by Local 785 to perform accoustic and drywall work involving a total value of over \$200,000, and a total of over 5,000 hours of work on twenty projects within the applicant's geographical jurisdiction during the past five years without any complaint, grievance, or objection from the applicant, the Council, or Local 785. Thus, there is some evidentiary basis for the respondent's contention that the use of carpenters supplied by Local 785 on projects in the five counties is an established local area practice in the Kitchener area.

10. As indicated above, the main issue in this case is whether the respondent can rely upon estoppel to shield it from liability in respect of the applicant's grievance. The doctrine of estoppel is succinctly summarized in the following passage from Brown and Beatty, *Canadian Labour Arbitration* (Agincourt: Canada Law Book Limited, 1977) at paragraph 2:2210:

"The concept of promissory estoppel is well established at common law and has been expressed in the following way:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

One arbitrator in a recent award has summarized the doctrine in the following terms:

It is apparent that there are two aspects of the doctrine as thus stated. There must be a course of conduct in which both parties act or both consent and in which the party who later

seeks to set up the estoppel is led to suppose that the strict rights will not be enforced. It follows that the party against whom the estoppel is set up will not be allowed to enforce his strict rights if it would be inequitable to do so. The main situation where it would be inequitable for strict rights to be upheld would be where the party now setting up the estoppel has relied to his detriment.

Thus, the essentials of estoppel are: a finding that there was a representation by words or conduct intended to be relied on by the party to which it was directed; some reliance in the form of some action or inaction; and detriment resulting therefrom...."

Although the Ontario Divisional Court decision in *Re Hospital Commission, Sarnia General Hospital and London District Building Service Workers' Union Local 220, S.E.I.U.*, [1973] 1 O.R. 240, cast some doubt on whether the doctrine of estoppel could be applied in labour arbitration proceedings, that doubt has been removed by a more recent unanimous judgment of that Court written by Osler J., who also wrote the decision in the former case: see *Canadian National Railway Co. et al.* (1981), 34 O.R. (2d) 385. Moreover, this Board has not infrequently applied that doctrine in the context of section 124 applications; see, for example, *Vanbots Construction*, [1982] OLRB Rep. July 1086; *Comstock International*, [1982] OLRB Rep. June 852; *Sinclair Welding Limited*, [1981] OLRB Rep. March 331, and *The Master Insulators' Association of Ontario, Incorporated*, [1979] OLRB Rep. Sept. 877.

11. It is also firmly established in the arbitral jurisprudence that acquiescence or inaction can have the effect of a "representation": see *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-242* (1982), 6 L.A.C. (2d) 30 (MacDowell), and the authorities referred to in that award. The labour relations rationale for that conclusion was aptly explained as follows by the British Columbia Labour Relations Board in *Re City of Penticton and C.U.P.E. Local 608* (1978), 18 L.A.C. (2d) 307, at page 320:

"... a collective bargaining relationship is quite a different animal [from a single, isolated commercial transaction]. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day-to-day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a

second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in *District of Burnaby*, [1978] 2 Can. L.R.B.R. 99, at page 103, 'it is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship – all contrary to the objectives of the Labour Code': see also the observations of Mr. Justice Hutcheon in *Larson et al. v. MacMillan Bloedel (Alberni) Ltd.*, [1978] 1 W.W.R. 749 (B.C.S.C. ). To return to the metaphor which was used earlier, it is equally as unacceptable to watch someone go out on the end of the limb, as it is to invite that person out on the limb – before sawing it off."

12. Having regard to all the evidence and the submissions of the parties, we are satisfied that all of the elements of estoppel are present in the instant case. It is reasonable to infer in the circumstances that Local 785 and, through it, the Council, of which it is an affiliate, were aware that the respondent has used only members of Local 785 on projects in the five counties, and has not used any members of Local 1316 as required by the provisions of Article 5. It is also apparent that the Council and its affiliates have acquiesced in the respondent's practice and, by not complaining, grieving, or objecting to that longstanding practice in any way, have led the respondent to believe that its practice is acceptable to the Council and its affiliates, including Locals 785 and 1316. Relying upon that acquiescence, the respondent has in good faith bid on and obtained work at a number of projects on the basis of the Local 785 wage, travel and board payments set forth in the Appendix. The detriment which the respondent would suffer if the grievance were to succeed is quite clear; it would not only be required to pay its "key men" (and any other worker from Local 785 whom it was entitled by Article 5 to use on the projects) the difference between the wages and related payments that the members of Local 1316 would have received if they had been employed on the project. Under the circumstances, it would be quite unfair and inequitable to permit the Council or the applicant, which is an affiliate of the Council, to assert right under Article 5 in respect of the Owen Sound project, or in respect of any other projects in the five counties on which the respondent bid prior to being notified of this grievance. As a matter of labour relations policy, it is neither desirable nor permissible for one affiliate, such as Local 785, which is the "union" with which an employer maintains an ongoing day-to-day working relationship, to knowingly accept the benefit of having its members employed on a substantial number of projects outside its geographical area in violation of the Appendix, without being taken to have in any impaired the ability of another affiliate, bound by the same Appendix and linked through the Council, to seek the strict enforcement of its rights under that Appendix, which forms part of the Provincial Agreement, negotiated by the Council (as part of the E.B.A.) on behalf of its affiliates. At some point in time, which in the circumstances of the present case was reached considerably in advance of the fifth year in which a provision such as Article 5 has been in force, the knowledge of an affiliate (such as Local 785) concerning an employer's practice which is inconsistent with such



provision, can reasonably and properly be imputed to the Council, and through it, to the other pertinent affiliate, such that neither the Council nor the other affiliate can begin to saw off the limb onto which the employer has been permitted to go, without duly notifying the employer of their intention to revert to their strict rights under the Appendix. However, by filing the present grievance, the applicant, on behalf of itself and the Council, gave the respondent such notice in respect of the application of Article 5 to projects in the five counties, and thereby brought the estoppel to an end in respect of any projects thereafter bid upon in that area by the respondent.

13. In view of our disposition of this matter, it is unnecessary to determine whether, as contended by the respondent, the applicant is also estopped from succeeding with this grievance by virtue of its (alleged) failure to take adequate steps to "police" the accoustic and drywall work performed by the respondent within its geographical area.

14. For the foregoing reasons, the grievance is hereby denied.

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**2524-81-R; 0144-82-M** Toronto-Central Ontario Building and Construction Trades Council (formerly known as the Building and Construction Trades Council of Toronto and Vicinity) on its own behalf of its affiliate, The International Brotherhood of Painters and Allied Trades District Council #46, Applicant, v. **M.J. Guthrie Construction Limited**, Rose-dale Construction, Respondents; The Toronto-Central Ontario Building and Construction Trades Council (formerly known as the Toronto Building and Construction Trades Council) on its own behalf and on behalf of its affiliates, Applicant, v. **M.J. Guthrie Construction Limited**, Respondent.

**Reconsideration - Related Employer - Trade Union - Building Trades Councils not trade unions for purposes of Act - Board confirming its prior finding that applicant council stands in same position as predecessor council - Reconsideration denied**

**BEFORE:** Ian Springate, Vice-Chairman, and Board Members W. Gibson and M. A. Ross.

#### **DECISION OF THE BOARD; April 18, 1983**

1. The respondent has requested that the Board reconsider its decision of September 27, 1982 in these matters. (See, [1982] OL Rep. Sept. 1332).

2. These proceedings arose out of both an application under section 1(4) of the *Labour Relations Act* and a referral of a grievance pursuant to section 124 of the Act. The request for reconsideration relates primarily to the section 1(4) application.

3. In 1950 M. J. Guthrie Construction Limited signed a “working agreement” with the Building and Construction Trades Council of Toronto and Vicinity, a non-certified council of building trades unions. This council operated under a charter granted to it by the Building and Construction Trades Department of the American Federation of Labour and Congress of Industrial Organizations (the “AFL-CIO”). In its decision of September 27, 1982 the Board concluded that on July 1, 1979 the Building and Construction Trades Department of the AFL-CIO had chartered the Toronto-Central Ontario Building and Construction Trades Council and assigned to it the jurisdiction of a number of existing councils, one of which was the Building and Construction Trades Council of Toronto and Vicinity. The Toronto-Central Ontario Building and Construction Trades Council is a non-certified council of trade unions. It includes among its members the trade unions that formerly belonged to the Building and Construction Trades Council of Toronto and Vicinity.

4. The section 1(4) application was filed by the Toronto-Central Ontario Building and Construction Trades Council “on its own behalf and on behalf of its affiliate, the International Brotherhood of Painters and Allied Trades District Council #46”. During the hearing into the application, the primary focus of the parties was whether or not M. J. Guthrie Construction Limited and another firm, Rosedale Construction, should be considered as a single employer for the purposes of the Act. The parties did not address themselves to the issue of what bargaining rights would in fact be affected by a declaration under section 1(4). The parties did deal at some length with the relationship between the two building trades councils, but they did not discuss the issue of what bargaining rights, if any, a building trades council might be able to exercise on its own behalf.

5. At Common Law a trade union is regarded as an organization of employees who have bound themselves together in a contractual relationship one with another. See: *Astgen v. Smith* (1977) 7 D.L.R. (3d) 657 (Ont. C.A.). The Building and Construction Trades Council of Toronto and Vicinity was not, and the Toronto-Central Ontario Building and Construction Trades Council is not, a trade union at Common Law for although they are groupings of trade unions, they are not themselves organizations of employees. See: *Famous Players Limited* [1982] OLRB Rep. July 1011. Section 1(1) (p) of the *Labour Relations Act* sets out the following definition of a trade union for the purposes of the Act:

“‘trade union’ means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.”

This definition appears to be wide enough to qualify as trade unions under the Act all organizations which would be recognized as trade unions at Common Law. However, the section also goes on to define as trade unions for the purposes of the Act two entities which would not otherwise qualify as trade unions, namely “a certified council of trade unions” and “a designated or certified employee bargaining agency”. Neither the Building and Construction Trades Council of Toronto and Vicinity nor the Toronto-Central Ontario Building and Construction Trades Council was designated or certified

as an employee bargaining agency. Both councils could properly be described as a council of trade unions, however, neither has been certified by this Board. (In this regard see section 10 of the Act which sets out the requirements for the certification of a council of trade unions). Accordingly, neither of the building trades councils comes within the definition of a "trade union" for the purposes of the Act.

6. The role of an uncertified council of trade unions was discussed as follows by the Board in *The Board of Education for the City of Toronto* case, [1982] OLRB Rep. March 496:

"It was agreed that the Council is not a certified council of trade unions as defined in section 1(1)(d). The Act contemplates that the role of an uncertified council of trade union is to act as an agent of the trade unions which it represents rather than as an independent participant and bargaining agent. The decision of the Board in *Bathe & McLellan Const. Ltd.* [1969] OLRB Rep. Jan. P. 1041, held that 'trade union' does not include an uncertified council of trade unions. It follows that the Council may neither hold nor exercise bargaining rights in its own name. However, the Council may act as an agent of other trade unions which possess bargaining rights."

7. As already noted, the Board in its decision of September 27, 1982 concluded that in 1979 the Toronto-Central Ontario Building and Construction Trades Council was chartered by the Building Trades Department of the AFL-CIO and assigned the jurisdiction previously held by the Building and Construction Trades Council of Toronto and Vicinity. In the respondent's letter of February 1, 1983 it submitted, in part, as follows:

"During the hearings of these matters the Respondent denied that the Building and Construction Trades Council of Toronto and Vicinity was the same as the Applicant Council, and denied that the latter could exercise any of the contractual or other rights of the former. The Respondent put the Applicant Council to the strict proof of those matters.

The only evidence which the Applicant Council tendered with respect to its purported assumption of jurisdiction or other rights from the Building and Construction Trades Council of Toronto and Vicinity was hearsay evidence, which was objected to by the Respondent. More specifically, no evidence whatsoever was presented with respect to the winding-up of the Building and Construction Trades Council of Toronto and Vicinity. No first hand evidence was proffered as to the procedures followed in constituting the Applicant Council. The only documentary evidence as to the Applicant Council's charter from the Building and Construction Trades Department of the American Federation of Labour and Congress of Industrial Organizations was a photostatic facsimile of such a charter. No evidence was led as to the authority of the Building and Construction Trades Department of the AFL-CIO to



“assign the jurisdiction of” the Building and Construction Trades Council of Toronto and Vicinity to the Applicant Council. No evidence was led by the Applicant Council as to any of its constitutional documents nor those of the Building and Construction Trades Council of Toronto and Vicinity or those of the Building and Construction Trades Department of the AFL-CIO. Nor was any evidence led as to unanimous concurrence having been given by members of the Building and Construction Trades Council of Toronto and Vicinity to any transfer of jurisdiction or any other rights to any other entity.

It is respectfully submitted that while the Board may, pursuant to section 103(c) of the Act, accept evidence which is not admissible in a court of law, it exceeds its jurisdiction where it bases its decision on such evidence. The Ontario Court of Appeal clearly established this principle in *R. V. Barber et al.*, [1968] O.R. 245, where it dealt with the similar provisions of what is now section 44(8) (c) of the Act. At p. 252 the Court stated:

‘However that provision does not relieve a board from acting only on evidence having cogency in law.’

Moreover the Courts have made it clear that a voluntary association such as a council of trade unions can only merge or transfer jurisdiction under certain circumstances. As stated in *Astgen v. Smith* (1969), 7 D.L.R. (3d) 657 at p. 664, “There is no inherent power in a voluntary association to merge with another...”. It was held that such an arrangement can only be accomplished by unanimous approval of the membership or by some action which each of the contracting members of the voluntary association have expressly or implicitly agreed to.

It is therefore respectfully submitted that there was no evidence upon which the Board could properly base its finding that the Applicant Council “stands in the same position” vis-a-vis M. J. Guthrie Limited as the Building and Construction Trades Council of Toronto and Vicinity, keeping in mind that such a finding was central to the matter before the Board.

Secondly, it is respectfully submitted that the Board does not have jurisdiction to make such a finding with respect to the relationship of the two Councils in question. It is trite law that the Board’s jurisdiction must be found within the ambit of the legislation under which it is constituted. Section 62 of the *Labour Relations Act* gives the Board the power to declare that a successor trade union has acquired the rights, privileges and duties of its predecessor where a merger, amalgamation or transfer of jurisdiction is claimed. The Applicant Council is not, however, a trade union within the meaning of section 1(1) (p) of the Act, as it is not,

insofar as we are aware, a "certified council of trade unions". Section 62 is therefore inapplicable to these proceedings. Indeed the Board did not purport to make the determination in question under that section. Barring the applicability of section 62, it is submitted that the Board does not have jurisdiction to render the determination in question under any other section of the Act."

8. We must, with respect, disagree with counsel's submissions regarding the alleged lack of evidence before the Board. Although the evidence on point was not as detailed as it might have been, there was sufficient evidence before the Board to lead it to conclude that the Toronto-Central Ontario Building and Construction Trades Council had been chartered by the Building and Construction Trades Department of the AFL-CIO and that it was assigned the jurisdiction of the Building and Construction Trades Council of Toronto and Vicinity. We note that part of the evidence took the form of testimony from Mr. David Johnson, currently the business manager of the Toronto-Central Ontario Building and Construction Trades Council and a former official with the Building and Construction Trades Council of Toronto and Vicinity. There was also introduced into evidence a copy of a letter dated August 10, 1979 from Mr. Robert A. Georgine, the president of the Building and Construction Trades Department of the AFL-CIO, to Mr. Johnson, who at the time was the secretary of the Toronto-Central Ontario Building and Construction Trades Council. The letter read as follows:

"Enclosed your [sic] will find the amended charter for the Toronto-Central Ontario Building and Construction Trades Council. This charter has been amended to include the previous jurisdiction of the Peterborough; Oshawa, Port Hope and Cobourg; Georgian Bay and Toronto Councils.

The jurisdiction covered is as follows: Counties of Northumberland, Peterborough, Victoria and Simcoe, the Provisional County of Haliburton (and the Geographic Townships of Lawrence and Nightingale), the District Municipality of Muskoka, the Municipality of Metropolitan Toronto, the Regional Municipalities of Durham, York, Peel and that portion of the Regional Municipality of Halton, East of Trafalgar Road (Regional Road No. 3).

I sincerely regret the delay in sending this charter to you, and wish you every success in your endeavours with the Council.

With kind personal regards, I am

Sincerely and  
fraternally,

Robert A. Georgine,  
President."

Also in evidence was a copy of a charter of the council, the original of which had apparently been executed by Mr. Georgine and each of the executive council members of the Building and Construction Trades Department of the AFL-CIO. Mr. Johnson

testified that the copy of the charter was identical to the original which was kept in his office.

9. We are of the view that the reasoning of the Court of Appeal in *Astgen v. Smith* relating to the merging of voluntary associations does not apply to the two building trades councils. The *Astgen v. Smith* case arose of the purported merger of two *fully independent* trade unions each with its own constitution, namely, the United Steelworkers of America and the International Union of Mine, Mill and Smelter Workers. The Building and Construction Trades Council of Toronto and Vicinity, however, was not itself an independent association. Rather, it was chartered by, and subordinate to, the Building and Construction Trades Department of the AFL-CIO, and as such would have been bound by the rules and constitution of the Department and of the AFL-CIO. It seems reasonable to assume that since the Department had chartered the council, it was entitled (subject to its own rules and governing statutes), to withdraw the charter and issue a new one to the Toronto-Central Ontario Building and Construction Trades Council giving it an expanded jurisdiction from that of the Building and Construction Trades Council of Toronto and Vicinity.

10. Given that the trade unions belonging to the old Building and Construction Trades Council of Toronto and Vicinity, an uncertified council of trade unions, are now members of the Toronto-Central Ontario Building and Construction Trades Council, an uncertified council of trade unions exercising the jurisdiction previously exercised by the former council, the Board concluded that "the Toronto-Central Ontario Building and Construction Trades Council stands in the same position vis-a-vis Guthrie as did the Building and Construction Trades Council of Toronto and Vicinity". Again since the issue was not discussed by the parties, the Board did not (and does not) make any findings as to what rights, if any, might be affected by such a conclusion. It would appear, however, that *if* the signing of the "working agreement" by M. J. Guthrie Construction Ltd. served to create bargaining rights for the various unions belonging to the Building and Construction Trades Council of Toronto and Vicinity, then in line with the reasoning of the Board in the *Board of Education for the City of Toronto* case, the Building and Construction Trades Council of Toronto and Vicinity could have acted as the agent for its member unions. *If* it is the case that those same unions continue to hold such bargaining rights, there appears to be no impediment to the unions now enforcing the terms of their respective provincial agreements either directly or through the Toronto-Central Ontario Building and Construction Trades Council acting as their agent. Whether or not the Council could have any rights of its own to exercise, however, is not at all clear. Again, since the parties did not raise the issue at the hearing, the Board in its decision of September 27, 1982, did not make any decision on point. In that the Council was a party to the 1(4) application, however, the Board did indicate that whatever rights (if any) the Toronto-Central Ontario Building and Construction Trades Council might have with respect to M. J. Guthrie Construction Limited, those rights would also apply to Rosedale Construction.

11. We trust that this decision will prove to be of some assistance to the parties. Given our reasoning set out above, however, we are not satisfied that the Board's decision of September 27, 1982 should be varied or revoked. The application for reconsideration is accordingly denied.

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**0831-82-U Canadian Union of Operating Engineers & General Workers, Local 111, Complainant, v. M & O Bus Lines (Handicab) Ltd., Respondent**

**Duty to Bargain in Good Faith – Unfair Labour Practice – Whether offer made-Board finding confusion and miscommunication due to change in union spokesman at root of problem – No bad faith bargaining by employer**

*[This decision was inadvertently omitted from the March 1983 issue]*

**BEFORE:** N. B. Satterfield, Vice-Chairman, and Board Members B. L. Armstrong and M. Eayers.

**APPEARANCES:** *Thomas P. Norton, Robert MacLeod and Kim Saddler for the complainant; William T. McInenly and Robert Moran for the respondent.*

**DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER M. EAYERS; March 14, 1983**

1. This complaint has been filed under section 89 of the *Labour Relations Act* alleging that the respondent has violated sections 15, 66, 67, 70 and 79 of the Act.

2. In respect of sections 66, 67 and 70, the complainant Canadian Union of Operating Engineers & General Workers, Local 111, ("the union") alleges that M & O Bus Lines (Handicab) Ltd., ("the employer") has attempted to require employees to sign individual contracts of employment; that it issued a written warning to an employee, Richard Sarrazin, for attending a union meeting during his lunch hour; that an employee, Kim Saddler, was suspended for three days primarily because of his activity in support of the union; that the employer had told union members who had engaged in a lawful strike that they were no longer welcome as employees and that the employer stated so to a reporter for Radio Canada. The union alleges also that the employer violated section 79 of the Act, the section which prohibits the alteration of, inter alia, rates of wages or any other term or condition of employment without the union's consent, by reducing the hours of work of employees Bob McLeod, Gregory Kelly, Kim Saddler and Timothy Reynolds and by increasing the hours of work for Andre Dubuc. The complaint alleges that McLeod, Kelly, Saddler and Reynolds are union supporters, Dubuc is not and the employer was motivated by those circumstances in its treatment of these employees. Consequently, it is alleged, the alteration of hours is a factor as well in the alleged violations of section 66, 67 and 70. In a similar manner, the disciplining of Sarrazin and Saddler is alleged to be a change in working conditions and part of the violation, alleged, of section 79.

3. Finally, the union is alleging that the employer has failed in its section 15 duty to bargain in good faith and make every reasonable effort to make a collective agreement by challenging the union from the start of bargaining to go on strike because, to quote from the particulars of the complaint, the union "... would look stupid setting up a picket line on the handicapped..."; and by the nature of its offers for settlement made after conciliation and mediation, particularly two offers made after conciliation that, it is alleged, were less than those made at conciliation.

4. The complaint sets the time frame for the employer's alleged misconduct as the three months preceding the making of the complaint and ongoing. The complaint was made July 30th, 1982.

5. This matter first came to hearing and continued during three further days of hearings, the last of which was in December. The Board heard the testimony of 12 witnesses, 11 for the union and one for the employer. The union's witnesses included all of the grievors named in the complaint and the solicitor who had acted for the employer during the early stages of the negotiations between the union and the employer. The Board has reviewed and considered the evidence of all of the witnesses to arrive at the findings of fact herein, but finds it unnecessary to set out the evidence in any detail. The Board has made its findings of fact after taking into account, as well, the consistency of each witness' evidence, their ability to recall the events about which they were testifying, the firmness of their memory, their ability to resist the influence of self-interest to modify their recollections clearly and their demeanour.

6. With respect to those allegations on which the union bases its claim that the employer has violated sections 66, 67, 70 and 79 of the Act, the evidence before the Board fails to make out the asserted allegations. Therefore, the Board finds that there has been no violation of those sections. Accordingly, the complaint is dismissed with respect to the alleged breaches of sections 66, 67, 70 and 79 of the Act.

7. There remains, therefore, the employer's alleged breach of its section 15 good faith bargaining duty. The bargaining duty of both parties to the collective bargaining process is prescribed by section 15 in the following terms:

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

8. The parties were engaged in bargaining for a first collective agreement following certification of the union by the Board. They commenced to bargain in late November or early December 1981. The union requested the appointment of a conciliation officer after their second meeting which was in late December. An officer was appointed on January 20th, 1982 and met briefly with the parties on February 5th. They resumed direct negotiations and then met again with the officer on April 7th. The parties were advised by letter dated April 23rd, 1982 that the Minister of Labour would not be appointing a conciliation board. The parties met on July 28th with a mediation officer and the employer agreed to submit its best offer for settlement within 10 days. The employer, through its solicitor, made a written offer on August 6th. It is this offer and an earlier one also made in writing on June 21st when bargaining resumed after it became lawful for the parties to strike or lockout, an offer which the union contends was a lesser one than the offer which it alleges was made at conciliation on April 7th and another which it alleges was made at the second negotiating meeting. This allegation is the primary thrust of the complaint with respect to section 15.

9. In fact, that is the only basis on which the complaint could be founded, since the evidence fails to establish that the employer challenged the union from the start to go on strike; which was the other leg of the complaint with respect to section 15.

10. As noted above, negotiations between the parties began in late November or early December 1981. The union submitted a proposed collective agreement for a one year term to be effective January 1st, 1982 and which included rates and other monetary terms. The union was represented by a three-man committee of which Robert Mahoney, an officer of the union and its national organization, was spokesman. The employer was represented by a lawyer from its solicitors and Robert Moran, the employer's president and sole shareholder. The proposed contract was reviewed clause by clause for clarification.

11. A second meeting held in the latter part of December was attended by Mahoney, the employer's solicitor and Moran. According to Mahoney the employer made a counter-proposal, including a wage proposal of 10% in each year of a two year agreement, the first wage increase and the agreement to be effective from January 1st, 1982. The two 10% increases would yield rates of \$7.11 per hour and \$7.82 per hour in the first and second years, respectively, for full-time handicab drivers. The proposal was put to a vote of the members and rejected. The testimony of a member of the union's bargaining committee describes the vote as an informal "straw" vote and stated that an informal vote was held because the offer had been made informally and was not a complete offer.

12. Immediately after the second meeting, the union requested the appointment of a conciliation officer. Mahoney was replaced on the union's committee by Tom Norton, business representative of the union, at about the same time as a conciliation officer was appointed. Three or four days before the February 5th meeting with the officer, Norton and a member of his committee presented a complete new set of proposals to Moran. They were in the form of a proposed collective agreement for a two-year term and included wage rates and other monetary terms. The proposed wages differed in part from those in the first set of proposals. There were no discussions of the proposals with the conciliation officer, instead the parties agreed with the officer that they should resume direct negotiations.

13. The parties did meet during the last week of February and discussed the new proposals clause by clause. No written counter-proposal was made by the employer. Again the union and employer disagree whether the employer made a verbal offer for settlement. The union contends that an offer was made which was very similar to the one it claims was made to Mahoney and that the first wage increase was to be retroactive to January 1st, 1982. The employer denies that it made any offer or proposal for settlement, but admits that the parties agreed on many non-monetary clauses. Moran testified that he also discussed a maximum settlement cost in a range related to the rate at which the cost-of-living index was increasing. He estimated this at 10% to 12% and stated to the union that the maximum acceptable settlement cost would be about 10%, which, if applied entirely to wages, would yield a wage rate of \$7.11 in the first year and \$7.82 in the second year for full-time handicab drivers.

14. The parties met with the conciliation officer a second time on April 7th. At that meeting and all subsequent ones, the employer was represented by Moran and employer counsel herein, who is one of the partners of the employer's solicitors. The parties reviewed clause by clause the union's proposals, but the meeting ended without any written proposal or offer being made by the employer. The union, however,



contends that the employer reiterated orally the offers which the union claims were made on the two earlier occasions, including the first year wage increase being made retroactive to January 1st, 1982. The employer maintains that it stood by its original position that the maximum settlement cost in the first year would be a 10% increase from date of signing and the union could have it applied anyway it wished as long as hourly cost of wages and benefits did not exceed \$7.11 for regular full time drivers, with a further 10% for a second year. The employer maintains further that it told the union it would not make the first year wage increase retroactive to January 1st and that it told the officer that it would make no concessions in excess of the 10% increase in costs.

15. The union and the employer had a further meeting on or about April 21st at which time they discussed whether the employer's school bus drivers were included in the bargaining unit. Moran advised the union that, if school bus drivers were to be included in the unit, a 10% increase applied to wages would result in an average rate for drivers of approximately \$6.85 in the first year because of the effect of the different wage rates and hours of work for school bus drivers. Again the union construed this as an offer and the employer insists it was nothing more than a discussion because the status of the school bus drivers was not resolved.

16. All of the events detailed above took place prior to the start of the time frame in which the union has set this complaint; that is, the three months preceding the making of the complaint and ongoing.

17. On June 21st, Moran and employer counsel met with Norton and presented the following proposal for settlement:

We may advise that we are the solicitors and agents of M & O Bus Lines (Handicab) Limited, hereinafter referred to as the Company.

Further to our recent meetings and discussions concerning the above-noted contract negotiations, we wish to inform you that the Company is now prepared to make the following contract proposals with a view to entering into a collective agreement concerning the employees of the bargaining unit.

*1. BARGAINING UNIT:*

The Company wishes to define the bargaining unit as all full time drivers employed by the Company in the transportation of handicapped persons pursuant to a contract entered into by the Company with O. C. Transpo. The union would be recognized as the sole bargaining agent for the said employees. The collective agreement would specifically exclude the following persons from the operation of the agreement and the bargaining unit:

- (1) an employee employed as a driver for handicapped persons for a period of less than six months.

- (2) all school bus drivers employed by the Company whether or not they perform part time duties in the driving of handicapped persons.
- (3) supervisors, persons above the rank of supervisor, office and clerical staff, maintenance workers, mechanics, and persons regularly employed for not more than 24 hours per week.

2. *"FULL TIME DRIVER"*: of a motor vehicle used in the transportation of handicapped persons under a contract entered into by the Company with O. C. Transpo, who works an average of not less than 40 hours a week in that capacity for the Company. The attached list of employees appear to be within the said bargaining unit.

### 3. *DURATION OF AGREEMENT:*

The agreement would take effect on execution and expire on December 31st, 1983 which coincides with the termination date of the Company's contract with O. C. Transpo.

### 4. *WAGE RATES FOR FULL TIME DRIVERS IN THE BARGAINING UNIT*

- (a) from the signing of the Agreement to December 31, 1982, the hourly wage of the employees would be \$7.00;
- (b) from January 1, 1983 to December 31st, 1983, the hourly wage would be increased to \$7.63.

### 5. *BONUS:*

In lieu of any provision for retroactivity, the Company is prepared to offer a bonus of \$250.00 to all employees in the bargaining unit as shown on the list attached to this letter.

### 6. *VACATION PAY:*

The Company is prepared to offer vacation pay and paid holidays in accordance with the terms of the Employment Standards Act; The paid holidays would be: New Years Day, Dominion Day, Thanksgiving Day, Christmas Day, Good Friday, Victoria Day, and Labour Day.

## 7. COMPANY MANUAL:

The employees agree to be bound by the terms and conditions outlined in the Company's work manual, attached hereto.

8. No employee of the Company or bargaining unit will be obliged to join the union nor shall it be a condition of employment for any employee present or future to join the union.

This offer is subject to obtaining agreement on the further standard terms of a collective agreement. However, should the above terms prove acceptable to the employees, it is not anticipated that there would be any major obstacle in reaching final agreement.

We would appreciate a response at your earliest convenience.

This proposal was rejected by the members. While the evidence is that the employer was not advised by the union of this result, it did learn of it. Whereupon employer counsel asked Norton to put forward the bottom position acceptable to the union. Norton admits that he told counsel orally that the union would accept a two year agreement with a wage rate of \$7.11 per hour for regular full-time handicab drivers retroactive to January 1st, 1982 in the first year and \$7.82 per hour effective January 1st, 1983. Nothing was given in writing by the union. The evidence of both parties establishes that there were only minor unresolved issues between them apart from the basic monetary issue, of which the question of retroactivity was the principle obstacle.

18. At this point, Norton was removed from the negotiations and replaced by another official of the union, Roger Claimont. When counsel requested the union's position in writing, Claimont respondent with the following proposal for a one year agreement in a letter dated July 8th, 1982:

Here are the counter proposals requested by yourself regarding M & O Bus Lines Drivers (Handcab [sic] Ltd.).

The drivers requests are as follows:

- (1) Wage settlement of \$7.35 hourly
- (2) Retro-active pay back to January 1, 1982
- (3) 50% of OHIP premium
- (4) Rain coats for all drivers.

Your prompt attention in this matter would greatly be appreciated.

These proposals are for a one (1) year period.



19. There was no further exchange of proposals until after the parties met on July 28th with the mediation officer. By this time Norton had been reinstated as spokesman for the union. The union said it would accept a settlement based on the issues settled on and a two year agreement with wage rates for drivers of \$7.11 per hour effective January 1st, 1982 and \$7.82 per hour effective January 1st, 1983. The employer agreed to respond in writing following the meeting and, within the agreed time limits, made the following proposal by letter dated August 6th:

Further to our meeting with Mr. Pryor of the Ontario Labour Relations Board, we now are prepared to make the following final offer in connection with the above-noted contract negotiations.

The Company is prepared to offer the following wage rates for full-time drivers in the bargaining unit as defined in our letter of June 21st, 1982:

- (a) From the signing of the agreement to December 31st, 1982, the hourly wage would be \$7.10.
- (b) From January 1st, 1983, to December 31st, 1983, the hourly wage would be \$7.73.

The other terms of our offer are as contained in our previous offer of June 21st, 1982, and we are not prepared to accede to your request that the wage increase be retroactive to January 1st, 1982.

In the meantime, this complaint had been made on July 30th.

20. The burden of proof in a complaint of violation of section 15 of the Act is on the complainant, the union in this case. There is no dispute that the employer made only two written offers; those of June 21st and August 6th. Not only are they the only written offers made by the employer, they are the only offers of any kind made by the employer within the time period within which the employer's actions are said to have constituted its failure to bargain in good faith. The main thrust of this complaint is that those two offers represent an unjustified retreat by the employer from two very similar offers which the union claims that the employer made at the April 7th meeting with the conciliation officer and, prior to that, at the second negotiating meeting with the union. The principal change, according to the union, was the employer's refusal or failure in its two written offers to make the first year wage increases effective from or retroactive to January 1st, 1982.

21. The employer contends that throughout the negotiations prior to its June 21st offer, when it was discussing possible settlement terms it was discussing the parameters of a possible settlement in which any first wage increase would be effective from the date of execution of an agreement. The employer's evidence was consistent with the evidence of the first two meetings given by its solicitor who was called by the union as one of its witnesses. If the employer did in fact make an offer for settlement either at the second negotiating meeting or the second meeting with the conciliation officer on

April 7th, the union's evidence stops well short of providing the Board with grounds for reasonably concluding that to be the case.

22. Had an offer been made at the second negotiating meeting, the Board would not have found it binding on the employer in the circumstances. Assuming, without finding, that the union members voted on something that they believed to be a settlement proposal from the employer, they rejected whatever it was they voted upon. Following that event, Norton replaced Mahoney as spokesman for the union and promptly submitted a complete new set of proposals for an agreement for a two year term instead of one year and with different wage proposals. That move, in the Board's view, had the effect of wiping the slate clean. With respect to the April 7th meeting with the conciliation officer, Moran was unshaken in his testimony that he made no offer at that meeting but only outlined, as he had done previously, the parameters of a possible settlement. On the other hand, the union's claim that the employer had reiterated the offer alleged to have been made at the meeting with Mahoney was unsupported by any cogent evidence. Therefore there are no grounds on which the Board could find that the employer's offers of June 21st and August 6th constitute a retreat from earlier offers.

23. What has happened, in the Board's view, is that, as one consequence of the union changing spokesman from Mahoney to Norton to Claimont to Norton along with the change in the employer's spokesman, there has been substantial miscommunication and confusion between the parties during their negotiations. In the result, the union may have misconstrued discussions concerning possible settlement parameters as oral offers. In these circumstances, the Board does not find that the employer has failed in its section 15 duty to bargain in good faith and make every reasonable effort to make a collective agreement with the union.

24. For these reasons, the complaint with respect to section 15 is dismissed. Therefore, having dismissed the complaint with respect to sections 66, 67, 70 and 79 of the *Labour Relations Act* for the reasons given at paragraph 6, the complaint is dismissed with respect to all alleged breaches of the Act.

#### **DECISION OF BOARD MEMBER, B. L. ARMSTRONG;**

1. I concur with the decision of the majority dismissing the complaint with respect to the alleged violations of sections 66, 67, 70 and 79 of the Act. The evidence adduced by the complainant does not support these allegations. However, I find that the evidence does support the alleged violation of the employer's duty to bargain in good faith and to this extent I dissent from the decision of the majority.

2. I will not review the negotiating history as this has been recounted in detail in the majority decision (see paras. 10-19). I will simply set out the point where my view of the evidence diverges from that of the majority and explain how this divergence leads me to the conclusion that the employer violated section 15.

3. In paragraph 21 the majority accepts the employee's assertion that it had not made a binding offer on wages prior to its first written offer of June 21, 1982. I reject this conclusion and find that in fact the employer did make a binding verbal wage offer on 2 occasions prior to its first written offer. This offer was \$7.11 per hour in the first year and \$7.82 per hour in the second year of the collective agreement. It was originally made in late December, 1982 and was repeated in late February, 1983 and early April 1983. Therefore, I find that the employer's written proposals of June 21 and August 6 did in fact include a retreat from its earlier verbal wage offers.

4. It is well established in the Board's jurisprudence on the duty to bargain in good faith that a change in bargaining position and particularly a withdrawal or reduction of an outstanding offer can in the appropriate circumstances, constitute bargaining in bad faith. Whether or not a retreat from a bargaining position amounts to bargaining in bad faith depends generally on whether or not there is some objective justification for the retreat. In practical terms there is an onus on the retreating party to put forward a credible explanation for its change of heart. (See, for example, *Fotomat* [1980] OLRB Rep. Oct 1397 where the Board rejected the employer's explanation of its withdrawal of a monetary offer as unbelievable and found that the withdrawal was prompted by the passage of Bill 89 and motivated by the desire to avoid reaching a collective agreement.) Although the cases make it clear that reneging is *prima facie* evidence of bad faith bargaining and that there is a practical onus on the reneging party to rebut this evidence by indicating justifying circumstances (e.g. the financial and psychological costs resulting from a strike: *Pine Ridge*, [1977] OLRB Rep. 65, *Toronto Jewelry Manufacturer's Assoc.*, [1979] OLRB Rep. July 719), the Board has never explicitly held that reneging raises a presumption of bargaining in bad faith. I would have made this implicit rationale explicit in this case and have held that reneging raises a presumption of bad faith and places a legal onus on the respondent to prove that its conduct was not unlawful.

5. In this case the respondent has adduced no evidence which could satisfactorily explain why it reduced its original wage offer. The informal rejection of this offer by the union cannot, by itself, justify the reduction of the offer. How was the company prejudiced by this rejection? The logic applied by majority on this point (see paragraph 21 where the majority declares that the union's rejection of the company's monetary offer had the "effect of wiping the slate clean") leads to the dubious result that the binding force of an offer in collective bargaining is totally contingent on its *immediate* acceptance by the offer. Thus, adopting the reasoning of the majority, if an employer says "\$10.00" and the union says "No way - \$15.00" each side would be free to come back the next bargaining session with a lower offer and higher demand respectively. This would clearly lead to total chaos in bargaining and is totally contrary to established collective bargaining practice. Common-sense clearly dictates that unless an offer is *explicitly* made contingent on acceptance by a certain date or on the occurrence of some other future event, both sides are bound by the positions they take on specific issues unless there is some demonstrable justification for a retraction. (The most common types of justification would be trade-offs of various sorts and the costs incurred as a result of either the sheer prolongation of bargaining or the initiation of industrial action by the opposite party). This dictum is clearly borne out by established collective bargaining practice which abhors capricious and arbitrary changes of



position by either side. Collective bargaining is a sufficiently perilous process without the added danger of whimsical and unpredictable changes of heart.

6. In the absence of any evidence from the employer to explain and justify the reduction of its original wage offer one is forced to conclude that this original offer was made in bad faith and therefore constituted a violation of section 15.

7. I also find that the employer failed to bargain in good faith insofar as it failed to present any sort of comprehensive written proposal until 7-8 months after the commencement of negotiations and generally engaged in sheer procrastination of the sort that is clearly designed to undermine the status of the union vis-a-vis the employees in the bargaining unit. In fact I would not hesitate to state that, in the absence of a *very* cogent explanation, any party that comes back to the second bargaining meeting without a complete or, at least, comprehensive written proposal for settlement, is guilty of bad faith bargaining. There is no excuse for not knowing what you can live with or for failing to communicate this promptly to the other side.

8. Unfortunately this sort of dilatory bargaining conduct on the part of employers is all too common, especially in first contract negotiations, for all too obvious reasons. The threat of contract arbitration as a possible remedy in bad faith bargaining complaints would go a long way towards curing recalcitrant employers of the nasty habit of procrastination. The time has clearly come for the Board to reconsider the position it adopted in *Radio Shack* that it lacks jurisdiction under section 89 to impose a collective agreement as part of a bad faith bargaining remedy. Our experience over the last 4 years has clearly demonstrated the need for the Board to adopt bolder and more imaginative measures in remedying employer refusal to recognize a certified bargaining agent.

9. In this case I would have proposed the following remedy for the employers violation of section 15:

- (i) a declaration that the employer had failed to bargain in good faith, etc.;
- (ii) a cease and desist order;
- (iii) a direction to the employer to restore its original wage offer;
- (iv) a direction to the employer to forthwith provide the union with a complete proposed collective agreement including the original wage offer and any other offers it had made to the union during the course of bargaining;
- (v) a direction to both parties to return forthwith to the bargaining table and to bargain in good faith, etc.

I would also have notified the parties that the Board would remain seized of this complaint and that if a collective agreement had not been reached within 3 months of the date of the Board's order, either party could apply to the Board for determination of a collective agreement on the basis of the final positions of the parties.

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**2644-82-R** United Brotherhood of Carpenters and Joiners of America Local 1190, Applicant, v. **Praetor Enterprises Limited**, Respondent

**Certification Membership Evidence – Practice and Procedure – Board not receiving membership evidence or declaration in Form 80 – Union claiming documents sent by registered mail prior to terminal date – Producing photo-copies and Canada Post registration receipt – Board accepting evidence in circumstances**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

**APPEARANCES:** *B. W. Adams and F. D'Abbondanza for the applicant; no one appearing for the respondent.*

**DECISION OF THE BOARD;** April 27, 1983

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*. In a decision dated April 7, 1983 the Board listed this matter for hearing in the following circumstances and for the following purpose:

“2. Applications made pursuant to the construction industry provisions of the *Labour Relations Act* normally do not require that a hearing be held by the Board. In the present instance, the Board has not received the evidence of representation in support of this application nor has it received a Form 80 as required by the Board's Rules of Procedure. The position taken by the applicant trade union is that prior to the terminal date, the evidence of membership and the Form 80 were sent by registered mail to the Board. The Board has not yet received these documents. In these circumstances, the Board directs that the Registrar list this matter for hearing. At the hearing in this matter, the Board will hear *viva voce* the evidence of the applicant trade union concerning the mailing by registered mail of the evidence of membership and the Form 80. The Board will then base its decision in this application for certification on that evidence.”

At the hearing in this matter, the Board heard under oath the *viva voce* evidence of Mr. Frank D'Abbondanza, a business representative of the applicant Local 1190. He handled the application for certification with respect to the respondent, Praetor Enterprises Limited, and his evidence is that on March 28th he mailed by registered mail to the Registrar of the Labour Relations Board an envelope containing certain membership documents and a Form 80. In support of this statement he presented a registration receipt from Canada Post for that date, listing amongst other things, a letter sent registered to the Registrar of the Ontario Labour Relations Board. Mr. D'Abbondanza also filed with the Board photocopies of five membership documents enclosed in the envelope. It was also Mr. D'Abbondanza's evidence that the applicant trade union had instituted a search with Canada Post on April 12th, 1983. However, that search had by the date of the hearing revealed nothing further on the missing envelope.

2. On the basis of the evidence before us, and in the circumstances of the present case, we are prepared to accept the evidence of Mr. D'Abbondanza that the documents referred to were mailed by registered mail prior to the terminal date of the instant application. The Board, therefore, finds that in this application for certification the applicant filed five combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

3. The respondent filed a reply, a list of employees containing seven names on Schedule "A" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.

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*[Findings as to trade union status, bargaining unit and percentage of membership support omitted]*

9. A certificate will issue to the applicant.

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**1945-82-R** United Food and Commercial Workers International Union, Applicant, v. **Primo Foods Limited**, Respondent, v. Group of Employees, Objectors

**Certification Where Act Contravened – Practice and Procedure – Unfair Labour Practice – Disputes settled prior to vote not permitted to be raised subsequently – Threat to one employee not communicated to any others – Vote not set aside in circumstances – Vote of particular employee not counted**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. Wilson and W. F. Rutherford.

**APPEARANCES:** *James Hayes and Vincent Gentile for the applicant; R. M. Parry, Helmut Fittler and Arthur Pelliccione for the respondent; George W. King and Helmut Dietz for the objectors.*

**DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON;** April 11, 1983

1. In a decision dated February 15, 1983 in this application for certification, another panel of the Board directed that a representation vote be taken of the employees of the respondent in the bargaining unit described in paragraph 3 of that decision. Prior to that decision, the representatives of the respective parties signed Minutes of



Settlement, dated February 10, 1983, by which they resolved a number of matters that had been in dispute among them, including a section 89 complaint which had been filed by the applicant (Board File No. 1946-82-U), an application for certification without a vote pursuant to section 8 of the *Labour Relations Act*, the bargaining unit description, and the eligibility of certain individuals to cast ballots in the representation vote which the parties were in agreement should be directed in this matter. Accordingly, a representation vote was taken on February 24, 1983. Twenty ballots were cast in that representation vote, including two segregated ballots cast by persons whose names appeared on the voters' list, and three segregated ballots cast by persons whose names did not appear on the voters' list. In view of the disputes which had arisen concerning the eligibility to vote of the five individuals who cast segregated ballots, the ballot box was sealed and the ballots were not counted.

2. In a letter dated February 25, 1983, which was filed with the Board on March 1, 1983, the applicant raised in a timely fashion certain allegations on the basis of which it contended that the representation vote would not disclose the true wishes of the employees. In a further letter delivered to the Board that same day, counsel for the applicant alleged that the conduct complained of in the aforementioned letter constituted violations of sections 64, 66, and 70 of the Act and reserved the right to rely upon section 8 of the Act.

3. Following the taking of the aforementioned representation vote, the parties agreed that the segregated ballots cast by persons whose names did not appear on the voters' list should not be counted since those three individuals were not eligible voters. At the commencement of the hearing held by this panel of the Board in Windsor on March 30, 1983, we heard the submissions of the parties concerning the eligibility to vote of the other two persons who cast segregated ballots. The Board also heard submissions concerning certain allegations raised by counsel for the objectors. After recessing to consider those submissions, the Board gave the following oral ruling, which is hereby confirmed:

"We are of the view that the February 10, 1983 Minutes of Settlement are dispositive of the issue of the eligibility to vote of Helmut Dietz and John Leipold. It was not suggested that Mr. Gentile could not, through the exercise of due diligence, have discovered, prior to signing that settlement, the information which the applicant now seeks to place before the Board concerning their duties and responsibilities. Accordingly, we find that Helmut Dietz and John Leipold were entitled to cast ballots in the February 24, 1983 representation vote and that their ballots should be counted, unless the Board decides to set aside that vote. With respect to the allegations set forth in counsel for the objectors' letter dated March 22, 1983, paragraph #1 is covered by the above ruling. Paragraph #2 is a matter which is not properly particularized and, in any event, is a matter which could and should have been raised much earlier if the objectors were seeking to rely on it. In any event, we are of the view that it is a matter that has been laid to rest by the Minutes of Settlement dated February 10, 1983. The allegations set forth in the balance of that letter are matters which have not been

raised in a timely manner. The last day for filing a statement of desire to make representations concerning the representation vote was March 3, 1983: see section 70 of the Board's Rules of Procedure. Counsel for the objectors has not satisfied the Board that there are any circumstances in this case which make it appropriate to extend the time for filing those objections. His attempt to file them 20 days late, and to particularize them on the eve of the hearing, has prejudiced the applicant, which has not had an adequate opportunity to prepare its defence to them. An adjournment for that purpose would also prejudice the applicant in view of the need for expedition in the disposition of certification applications, as has long been recognized by this Board and by the Courts. In any event, we are of the view that those allegations, if proved, would not prompt the Board to set aside the representation vote. Accordingly, we shall proceed to hear the evidence and argument of the parties with respect to the applicant's application for certification under section 8, which deals only with matters which followed the February 10, 1983 Minutes of Settlement and were not covered by that document."

(Counsel for the objectors and counsel for the respondent each asked the Board to note that they objected to the portion of that ruling which pertains to the allegations contained in the letter of March 22, 1983.)

4. The evidence establishes that on or about Friday February 18, 1982, Helmut Fittler, the General Manager of the respondent's plant in Cottam, Ontario, telephoned bargaining unit employee Goulen Chi and told him that he had something to discuss with him the following day. Although Mr. Chi does not usually work on Saturdays except during the tomato season (from August to October), he attended at the plant on Saturday February 19, 1983 and met privately with Mr. Fittler. It was Mr. Chi's uncontradicted evidence that during that meeting Mr. Fittler told him that the union would not be good for the employees because unionization of the plant might lead to layoffs or a reduction to "three days a week", and that a strike might result in the closure of the plant. Under the circumstances, we find that the respondent, through Mr. Fittler, contravened sections 64, 66, and 70 of the *Labour Relations Act*. If those statements had been communicated to other bargaining unit employees prior to the representation vote taken on February 24, 1983, it might well be that the true wishes of the employees would be unlikely to be ascertained from that vote. However, Mr. Chi did not tell any of the other employees what Mr. Fittler said to him, nor is there any evidence that similar statements were made to any other employees by Mr. Fittler or by anyone else. The evidence of Herman Sawatzky, another bargaining unit employee, does not disclose any contravention of the Act. Although Mr. Sawatzky received a raise prior to the vote, we are satisfied from his evidence that the raise reflected a promotion to the position of mechanic, for which he had been in the process of being groomed prior to the applicant's organizational activities. With the increase that the respondent was experiencing in the amount of mechanical work required to be performed at its Cottam plant, there was nothing improper in promoting Mr. Sawatzky to that position. Indeed, a failure by the respondent to do so might itself have constituted an unfair labour practice under the circumstances. We are also satisfied that the comments which

Steve Fittler, who is in charge of plant maintenance, made to Mr. Sawatzky about the union, fell within the ambit of the employer's "freedom to express his views" under section 64 of the Act.

5. Under the circumstances, the ballot cast by Mr. Chi in the February 24, 1983 representation vote is unlikely to reflect his true wishes with respect to representation by the applicant in his employment relations with the respondent, since it might well have appeared to Mr. Chi that a vote in favour of the applicant would be tantamount to voting himself out of a job, or at least out of employment involving more than three days per week (see, for example, *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801). However, there is nothing before the Board which establishes that the true wishes of any of the other employees who cast ballots are unlikely to be accurately reflected by that vote. Indeed, those ballots may be more truly reflective of their wishes than would be ballots cast after the hearing of this matter, in view of the inevitable dissemination of information concerning Helmut Fittler's comments to Mr. Chi that will result from the hearing and deciding of this matter.

6. Under the circumstances, we are not prepared to exercise our discretion to certify the applicant pursuant to section 8 of the Act at this stage in these proceedings, as we are of the view that it would be appropriate for the ballots cast in the February 24, 1983 representation vote to be counted. In the event that the applicant loses that vote by a single ballot, the Board will entertain further representations of the parties with respect to the appropriate disposition of this application.

7. For the foregoing reasons, the Board hereby directs that the ballots cast in the February 24, 1983 representation vote be counted forthwith, including the segregated ballots cast by Helmut Dietz and John Leipold. Having regard to the agreement of the parties, the segregated ballots cast by Andy Johnson, Ed Thiessen, and Andy Sutoris are not to be counted.

8. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER W. F. RUTHERFORD;**

1. I dissent. Mr. Helmut Fittler, General Manager for Primo Foods Limited, Cottam, Ontario, contravened the *Labour Relations Act*. Mr. Fittler called Goulen Chi to attend at the plant and discuss the unionization campaign on the weekend prior to the certification vote. His statements to Chi about a possible three-day work week or plant closure if the union won the vote, were intended to intimidate the employee into voting against the union.

2. Mr. Sawatzky stated in evidence that he had been called by Mr. Steve Fittler, the brother of the General Manager, to come to the plant on Saturday, February 19th, prior to the union vote. At that time, he was offered a promotion to a permanent mechanic's job that he had been doing on a part-time basis along with his cooking job for some months. The offer included a wage increase of \$1.15 per hour. They then discussed the pros and cons of the union campaign at the Cottam plant.



3. It is my contention that both Helmut and Steve Fittler arranged the interviews prior to the certification vote as a pressure tactic to have the employees vote against the union. Their approach in this manner went beyond the bounds of management's rights during a union campaign as set out in section 64 of the *Labour Relations Act*.

4. The Fittlers' actions interfered with the rights of employees as set out in section 3 of the *Labour Relations Act*. A vote following their interference would not reflect the true wishes of the employees. On that basis, I would have certified the applicant union without a representation vote pursuant to section 8 of the Act.

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## 2347-82-R Ontario Public Service Employees Union, Applicant, v. Her Majesty The Queen in Right of Ontario, Respondent

Crown Transfers Act – Practice and Procedure – Sale of a Business – Witness – Transaction not crystallized – Application premature – Witness served sub-poena not appearing at hearing – Party seeking attendance of witness required to enforce subpoena – Board practice not to seek enforcement on its own

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members L. Collins and W. H. Wightman.

**APPEARANCES:** *Chris G. Paliare, Pauline R. Seville, Ivor Oram, James Clancy and Art Lane for the applicant; C. G. Riggs, D. Alfieri, J. Hunter, F. Koch and C. Slater for the respondent.*

### DECISION OF THE BOARD; April 7, 1983

1. This is a application under section 4 of *The Successor Rights (Crown Transfers) Act, 1977*. It concerns the purported (or impending) transfer to “the private sector” of a home for the developmentally handicapped known as the St. Lawrence Regional Centre and operated by the Crown in Right of Ontario.

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3. When this matter came on for a hearing before the Board, counsel appeared on behalf of the Crown and submitted that, there was no intention to impede these proceedings, but they appeared to him to be premature. It was his information that there was, as yet, no legal entity to which any transfer of operations had been effected, although he had been advised that a number of individuals were seeking to create such entity by letters patent, and that subsequently there would be a transaction with the Crown in respect of the subject facility. He suggested that the matter be adjourned until the transaction had crystallized and undertook to advise the applicant of the situation when he himself was advised. Moreover, since the Crown (as predecessor employer) would necessarily be in a position to know when any transaction to which the Act could

apply had been completed, this seemed to the Board to be a sensible suggestion and one which could avoid the prospect of unnecessary litigation. For as things currently stand, the union has no means of knowledge about the transaction other than through an application such as this but, because its members' rights depend upon the *timing* of the transaction's completion, it is put in the position of making repeated applications, some of which will necessarily be premature, simply to protect its bargaining rights. That is obviously in no one's interest.

4. After some discussion, the applicant agreed to accept the suggestion of counsel for the Crown, to adjourn this matter for the time being, and to bring it on again when the situation crystallizes. The applicant was further content to accept counsel's undertaking to keep the union informed.

5. The only other matter which arose involves a subpoena issued to one Robert W. Runciman. Mr. Runciman was shown the original, and personally served with a copy of a subpoena (together with conduct money) requiring his presence for the hearing in Toronto. However, Mr. Runciman indicated that he did not intend to appear because, he said, he had only been left with a copy of the subpoena. He did not in fact appear at the hearing. Since the evidence establishes that service was properly effected, the applicant requested the Board, on its own motion, to seek an appropriate Court order directing compliance with its subpoena. We decline to do so.

6. The authority to issue a subpoena is spelled out in section 12 of the *Statutory Powers Procedure Act* which reads as follows:

12.-(1) A tribunal may require any person, including a party, by summons,

(a) to give evidence on oath or affirmation at a hearing; and

(b) to produce in evidence at a hearing documents and things specified by the tribunal, relevant to the subject-matter of the proceedings and admissible at a hearing.

(2) A summons issued under subsection (1) shall be in Form 1 and,

(a) where the tribunal consists of one person, shall be signed by him; or

(b) where the tribunal consists of more than one person, shall be signed by the chairman of the tribunal or in such other manner as documents on behalf of the tribunal may be signed under the statute constituting the tribunal; and

(c) shall be served personally on the person summoned who shall be paid the like fees and allowances for his attendance as a witness before the tribunal as are paid for the attendance of a witness summoned to attend before the Supreme Court.

(3) Upon proof to the satisfaction of a judge of the Supreme Court of the service of a summons under this section upon a person and that,

- (a) such person has failed to attend or to remain in attendance at a hearing in accordance with the requirements of the summons;
- (b) a sufficient sum for his fees and allowances has been duly paid or tendered to him; and
- (c) his presence is material to the ends of justice,

the judge may, by his warrant in Form 2, directed to any sheriff, police officer or constable, cause such witness to be apprehended anywhere within Ontario and forthwith to be brought before the tribunal and to be detained in custody as the judge may order until his presence as a witness before the tribunal is no longer required, or, in the discretion of the judge, to be released on a recognizance (with or without sureties) conditioned for appearance to give evidence.

(4) Service of a summons and payment of tender of fees or allowance may be proved by affidavit in an application under subsection (3).

(5) Where an application under subsection (3) is made on behalf of a tribunal, the person constituting the tribunal, or where the tribunal consists of two or more persons, the chairman thereof may certify to the judge the facts relied on to establish that the presence of the person summoned is material to the ends of justice and such certificate may be accepted by the judge as proof of such facts.

(6) Where an application under subsection (3) is made by a party to the proceedings, proof of the facts relied on to establish that the presence of the person summoned is material to the ends of justice may be by affidavit of such party.

That section makes it clear that a Board subpoena is binding upon those to whom it is directed, but this does not mean that it is the Board which must seek enforcement, nor has it been the Board's practice to do so. While the Board may be entitled on its own motion to make such application to the Court (see section 12(5)), the Board has generally left it to the party seeking the attendance of a witness to take the necessary steps to ensure that the subpoena is complied with. Certainly, in the circumstances of this case, there is no compelling reason why the Board should enter the arena as a litigant opposed in interest to a potential witness in proceedings before it. Section 12 provides the applicant with a remedy should it seek to pursue it.



7. We also note that these proceedings were commenced under *The Successor Rights (Crown Transfers) Act*, but the subpoena served upon Mr. Runciman refers to the *Labour Relations Act*. Thus, it is arguable that the subpoena is defective, even though service was not. Of course, this is a question which would ultimately have to be determined by a Court, but the problem could probably be avoided altogether by the issuance and service of a new subpoena.

8. For the foregoing reasons, this application is adjourned *sine die* for a period not exceeding one year. Unless within that time, the parties request that the Board proceed with the matter, it will be terminated.

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**2627-82-M** Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Suss Woodcraft Ltd.**, Respondent

Arbitration - Construction Industry Grievance - Practice and Procedure - Employer having notice of hearing sending telegram to Board denying breach - Not attending hearing - Board proceeding in absence of employer - Board having authority to implement oral settlement of grievance reached between parties - Employer directed to comply with oral settlement

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

**APPEARANCES:** J. J. Nyman and J. Cartwright for the applicant; no one for the respondent.

**DECISION OF THE BOARD;** April 21, 1983

1. This is the referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*.

2. The matter was initially scheduled to be heard on March 30, 1983, and the respondent was served with Notice of that at its head office in Montreal. Counsel for the applicant advised the Board, however, that the parties agreed to adjourn the matter to April 7, 1983, at the request of the respondent. The day before the April 7th hearing, the Board then received the following telegram from the respondent:

GTU066 APR 06 1403 EST

CTB525  
MMB481 MBBA356 67 FR  
CRT MONTREAL QUE 06 1333

ONTARIO LABOUR RELATIONS BOARD  
ATTN D K AYNLEY REGISTRAR.

TELEPHONE 965-4178 AND MAIL  
400 UNIVERSITY AVENUE TORONTO ONT  
M7A 1V4

BT  
RE YOUR FILE NUMBERS 2627-82-M  
CARPENTERS DISTRICT COUNCIL AND SUSS WOODCRAFT.  
HEARING APRIL 7/83 9.30 AM TO BE SUBMITTED AS OUR  
STATEMENT.

A) WE DID NOT HIRE A NON UNION CARPENTER.

B) WE INSTRUCTED OUR SUPERVISOR DAVID GRIER TO  
HIRE FROM THE UNION HALL AS USUAL. IF HE DID NOT  
IT IS WITHOUT OUR KNOWLEDGE OR CONSENT.

JULIUS SUSS SUSS WOODCRAFT LIMITED

The mere filing of a statement cannot, of course, take the place of evidence before the Board, nor would the lack of knowledge or consent by head office constitute any defence to a violation of the collective agreement by the company's own supervisor. The Board waited until 10 a.m. on the day of the hearing to afford the respondent a further opportunity to appear, and then proceeded in its absence.

3. The applicant's evidence is that the respondent, Suss Woodcraft Ltd., had become bound through a prior voluntary recognition agreement to the Carpenters' collective agreement covering industrial, commercial and institutional work in the Province of Ontario. That agreement requires a company to hire only members of the union, through requests made to the union hiring hall. The company, although resident in Montreal, had at least 3 jobs operating in the Toronto area at the time that this grievance arose. The Union's business representative for the area, John Cartwright, noticed in early February a "Suss Woodcraft" sign on a construction project at Hazelton Lanes in Toronto, and questioned the carpenter at work on the job. Mr. Cartwright ascertained upon further investigation that that individual, a Mr. Gray, was not a member of the applicant at the time. Mr. Gray put Mr. Cartwright in touch with a Mr. Grier, who identified himself as the superintendent for Suss Woodcraft for the 3 jobs in Toronto. After speaking to Mr. Grier, Mr. Cartwright got in touch with Mr. J. Suss of the respondent in Montreal. Mr. Suss initially questioned whether the work in question was covered by the collective agreement, and Mr. Cartwright apparently made it clear

that it was. Mr. Suss then said that Mr. Grier was in charge in Toronto, and that he was unaware exactly whom Mr. Grier was hiring.

4. Mr. Cartwright then arranged a meeting with Mr. Grier on February 28th, to discuss the alleged violation of the collective agreement. At the end of that meeting, Mr. Grier agreed to terminate Mr. Gray and hire a carpenter through the union's hiring hall. That took place immediately, and a union carpenter completed the work on that project as well as another still ongoing in the Toronto area. Mr. Grier did not agree to pay damages, however, and Mr. Cartwright filed a grievance for that aspect of his claim immediately after the meeting.

5. Mr. Cartwright subsequently received a telephone call from Mr. Suss, asking for a meeting in Toronto on March 2nd to discuss the grievance, and a meeting took place between Mr. Suss and Mr. Cartwright on the premises of Ramca Tiles. Mr. Suss at first denied responsibility for what had occurred, but ultimately acknowledged he might have some responsibility, and pulled out the time sheets showing hours worked by the non-union carpenter. The time sheets showed 3 weeks' work (120 hours) spread over a 4-week period, and the hourly rate payable under the collective agreement was \$19.76. Some negotiation took place over what would be a fair settlement to both sides, and \$1,000 was finally agreed upon as a figure to resolve the grievance. The meeting then ended with Mr. Suss saying that Mr. Cartwright would have a cheque by Friday. To date, no cheque has been received.

6. The applicant argues that, on the facts set forth above, this matter has been settled, and asks the Board to simply direct the respondent to implement the settlement. In the alternative, the applicant argues that the above facts disclose a clear violation of the collective agreement, as well as an accurate measure of damages, and that the respondent should be ordered to pay the full amount of \$2,371.20 owing.

7. The Board in a section 124 referral is acting in the place of an arbitrator, and Mr. Nyman for the applicant has brought to the Board's attention considerable arbitral jurisprudence for his position that an arbitrator can order the implementation of a settlement reached under the collective agreement. In *The Corporation of the Town of Scarborough* (unreported), released May 23, 1978 (Brandt), the employer's Board of Control met with the union to discuss a grievance, and at the conclusion of the meeting passed a resolution upholding the grievance and awarding the grievor the transfer which he sought. At a subsequent meeting, the matter was re-opened and the Board passed a resolution reversing its decision. The Board of Arbitration unanimously found that the initial action of the Board of Control constituted a decision which in effect resolved the grievance between the parties, and wrote, at page 4 of its award:

"... for the purposes of the orderly and final resolution of disputes arising between the parties to a collective agreement a decision of [the employer] once reached must be treated as final and as one which the parties to the agreement can rely on as representing the disposition by the [employer] of an outstanding matter. Were it otherwise there would be no finality to the grievance procedure. This would not be conducive to the orderly administration of the collective agreement.



The consequence of settlement of a grievance in the grievance procedure is to render inarbitrable that grievance or any subsequent grievance which raises the same issue. In *Re City of Sudbury*, 1965 15 L.A.C. 403 (Reville) the following quotation from *Re Mueller Limited* 1961 12 A.C. L.A.C. 131 (Reville) was approved:

The grievance procedure is designed to provide members of the bargaining unit and the union with a method of orderly processing their respective grievances. In order to avoid the expense inherent in the arbitration process the procedure provides for bona fide efforts to be made by the grievor and management to settle the dispute at various stages and at various levels. It follows, therefore, that if the grievor and/or the Union actually or impliedly accepted the decision of management they should not be allowed to have second thoughts on the matter and re-process essentially the same grievance at a later date. If this were to be allowed, management would never know whether, in fact, its decision had been accepted by the individual grievor or the union representing him, and management would be plagued and harassed in what would be a plain abuse of the grievance procedure.

It may equally be said of this case that the Union must be in a position to know that decisions arrived at by management can be relied on as constituting a final disposition of a matter in dispute and not subject to reopening at a later time.

The Board then concluded:

In the result the grievance is allowed and the Corporation is directed to implement the decision of the Board of Control.

8. In *Canadian International Paper Company* (unreported), released May 22, 1982 (Brunner), the arbitrator found as a fact that a grievance had been settled orally at a meeting between the company and the union. The union witnesses, whom the arbitrator found to have a much better recollection of the meeting than the company witnesses, provided the following account:

"... The matter was then reviewed and reference was made by Connors to the fact that over one year's back pay was at issue. Amounts of \$1,000 and \$1,500 were mentioned. Tinmouth suggested that the payroll records would have to be perused to ascertain the exact number of hours that were involved. To this Connors replied that he would be satisfied with whatever amount Tinmouth agreed was 'sufficient to cover the damage'. Tinmouth then asked whether Batten and Bucking were the only employees with similar grievances. Connors after 'looking around' the room stated that they would be the only two grievors if 'we can consider

the matter resolved'. To this Tinmouth replied 'you can consider the matter resolved and I will check the payroll cards'.

After reviewing the authorities in support of the proposition that evidence of settlement discussions is admissible and necessary *to prove that a settlement has been made*, the arbitrator concluded:

"I find that the terms of the settlement were that Batten and Bucking were to be paid at the level H hourly rate set forth on p. 28 of the Collective Agreement for each hour they had worked on or after April 1, 1979 as Lead Hands."

and directed as follows:

"... the grievance must be allowed and a declaration that a settlement agreement in the terms already noted was entered into on July 4, 1980 is issued. The Company is directed to forthwith implement the settlement and pay Batten and Bucking for all hours worked by them as Lead Hands between April 1, 1979 and June 25, 1980, at the then prevailing level H hourly rate for the single Service division less whatever amounts they were paid at their scheduled occupational rates."

9. *Bittner Packers Limited* (unreported), released January 27, 1982 (Betcherman), also cited by Mr. Nyman, is a case perhaps more directly related to the applicant's alternative argument, but recognizes a principle of finality similar to the two previous cases. The company had admitted liability in the course of grievance discussions, but no "settlement" of the remedy, in terms of a payment of damages, had ever been arrived at. The arbitrator wrote at page 5:

"... I find it to be a clear and unequivocal admission by a person in authority that the union's interpretation of Article 1.03 was correct and that the company had breached the article by using part-time employees where it was possible to use full-time employees.... Thus it is my finding that the company clearly admitted its liability and it cannot retract its admission at this stage: see *re Air Canada and Canadian Air Line Employees' Association*, (1980), 27 L.A.C. (2d) 405 (Weatherill)."

The arbitrator then went on to deal with the outstanding issue of damages.

10. In the present case, all aspects of the union's claim are said to have been settled. The settlement was not in writing, but as the *Canadian International Paper Company* case, *supra*, shows, that is simply a matter of proof. Here there was no evidence called by the respondent to refute the sworn testimony of Mr. Cartwright, and the Board has no difficulty concluding that an oral settlement was reached for the payment of \$1,000 to the union.

11. The company is accordingly directed to pay the amount of \$1,000.00 to the union forthwith.

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**2413-82-M** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, Applicant, v. 384368 Ontario Limited and **Thunderhawk Developments**, Respondents

**Construction Industry Grievance – Practice and Procedure – Reconsideration-Board receiving evidence at arbitration hearing on issue of identity of employer and inviting written submissions – Union’s request that Board defer to determination by different panel in certification application by different union denied – Board not reconsidering decision**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members A. Hershkovitz and J. A. Ronson.

**DECISION OF THE BOARD; April 15, 1983**

1. The Board has heard the evidence of the parties to this grievance referral with respect to a preliminary issue of the identity of the proper employer of the persons on whose behalf the grievance was brought. The hearing dealing with this preliminary issue at which the evidence was received took place on March 10th and the parties agreed to make written submissions to the Board as to how it should determine that issue on that evidence. Prior to the date when their submissions were to be filed, the Board received a request from counsel for the applicant (“Carpenters Local 1669”) to defer determination of the issue until the same issue was resolved in another application to which the respondent herein was also respondent.

2. That application was an application for certification made by the Labourers’ International Union of North America, Local 607 (“Labourers Local 607”) with its construction labourers allegedly employed by the respondent herein. The Carpenters Local 1669 has filed an intervention in that application. The Board issued an interim decision on March 28th declining to accede to counsel’s request stating in part as follows:

Counsel for the applicant herein has requested that the Board not determine the issue of the identity of the proper employer until the Board can have before it the facts with respect to the same issue which counsel expects to be raised in the application for certification.

The Board declines to accede to counsel’s request. The application for certification is an entirely separate matter. Moreover, the evidence with respect to the identity of the proper employer in the grievance referral is already before the Board and counsel’s letter does not reveal any grounds which might be cause for the Board to re-open this matter in order to consider further evidence on this preliminary issue.

3. In a letter dated April 6, 1983, counsel has requested that the Board reconsider its interim decision and “... await the findings of fact in [the application for certification of Labourers Local 607] before determining the question now before it.”. Counsel bases his request on charges contained in the application for certification with



respect to alleged conduct of the respondent at two meetings which it is alleged to have held with its employees. These allegations are as follows:

On or about January 4, 1983, the Respondent, Rodger Dolyny, called a meeting at the aforementioned job site of all the employees of the Respondent, Thunderhawk Developments, at the aforementioned job site. Inter alia, he advised the employees that those who joined a Union would be fired and that if a Union were certified senior members of the Union would displace the current employees.

On or about February 23, 1983, the Respondent, Rodger Dolyny, called a meeting at the aforementioned job site of all the employees of the Respondent, Thunderhawk Developments, at the aforementioned job site. Inter alia, he advised the employees that he could discharge employees on the slightest pretext, that if employees objected to conditions of work at the site they should quit and that any problems should be directed to him and *distributed a purported contract of employment which the employees were directed to sign or be discharged.* (emphasis in the original)

Counsel's letter had this to say about those allegations:

We draw the Board's attention in particular to paragraph 2 and 3. While it is conceded that the statements contained therein are no more than allegations of fact at the present time which have yet to be proved we submit that such allegations if established are very material to the Board's determination in the present case. Specifically, we submit that the issues raised in the Application for Certification and related Section 89 Complaint go directly to the question of the "consensual element" of the employment relationship a factor noted as being of significance by the Board in, for example, the unreported decision of Group Thirty Three Limited (OLRB File 5889-74-R, December 17, 1974). Any question that the employees who had to be "advised" of who their employer was by Dolyny and continued to work notwithstanding such advice ... must be viewed in light of the allegation [that] at a meeting held of employees a purported contract of employment was distributed which the employees were directed to sign or be discharged.

These are matters of course in respect of which the applicant herein had no knowledge and therefore could not have addressed or even reasonably anticipated when the matter first came on for hearing....

4. The application for certification was heard by the Board, differently constituted than herein, on April 12th, 13th and 14th. If the above allegations were pursued by Labourers' Local 607, the Board constituted to hear that application is seized with making the findings of fact with respect to the allegations as well as with respect to the issues of the identity of the proper employer. While that issue is common to both

applications, the parties are different and the applications are before the Board differently constituted in each case. Moreover, the evidence with respect to the common issue is already before the Board in the instant case.

5. Assuming, without concluding, that there could be circumstances where the composition of the Board and the parties are different in two separate proceedings which have a common factual issue, wherein the Board in one case might be prepared to consider the findings of fact in the second case, the Board herein is not persuaded that those circumstances exist here. The evidence is complete on the preliminary issue in the instant case. This panel of the Board is seized with this matter and therefore is obliged to determine the issue based upon the evidence it has already heard. That determination cannot be properly influenced by findings of fact made by another panel of the Board based on evidence which *might* be different in the application for certification.

6. For these reasons the Board is not prepared to reconsider its decision which issued March 28th.

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**2216-82-R; 2472-82-U** Ontario Public Service Employees Union, Applicant/Complainant, v. **Toronto General Hospital**, Respondent.

**Certification Where Act Contravened – Interference in Trade Unions – Representation Vote – Unfair Labour Practice – Union losing vote seeking certificate on basis of employer violation – Employer communications within bounds of free speech – Breach of silent period not causing Board to direct new vote**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members F. W. Murray and S. Cooke.

**APPEARANCES:** *Raj Anand, Dayle Floyd, Pauline Seville and Ivor Oram for the applicant/complainant; Brian O'Byrne, Corby Hamilton, Rick Ellis and Anneli Talvila for the respondent.*

**DECISION OF THE BOARD;** April 12, 1983

1. The Board directs that the above application and complaint be and the same are hereby consolidated.

2. Board File No. 2216-82-R is an application for certification in which the applicant requested a pre-hearing vote. In a decision dated February 14, 1983 the Board directed the taking of a pre-hearing vote and the same was conducted on February 24. There were 285 employees named on the voters' list and 232 of these voted. There was one spoiled ballot and 16 segregated ballots. Of the remaining 215 ballots, 146 of these were against representation by the applicant and accordingly, in the normal course this application would be dismissed.

3. The applicant filed a complaint under section 89 of the Act dated March 3, 1983 in support of which it filed the following particulars:

(1) On January 27, 1983, the Applicant applied for certification as bargaining agent of certain employees of the Respondent and requested a pre-hearing vote.

(2) The Respondent replied to the application on or about February 7, 1983.

(3) On February 14, 1983, the Board ordered a pre-hearing vote to be held. This decision was conveyed to the parties by letter dated February 15, 1983 from the Registrar, who drew attention to the following direction:

"I direct all interested persons to refrain and desist from propaganda and electioneering from midnight of Sunday, February 20, 1983, until the vote is taken."

(4) From February 11 to February 23, 1983, persons acting on behalf of the Respondent, including Mr. D. Corbett Hamilton, Director of Personnel and Labour Relations, and Mr. W. V. Stoughton, President of the Respondent, forwarded letters by courier to individual members of the bargaining unit at their homes which were motivated by anti-union sentiment and whose effect was to coerce, intimidate, threaten or unduly influence a reasonable employee so as to deprive him or her of the ability to vote freely in the selection or rejection of trade union representation by the Applicant. Copies of two of these letters, with their addresses blanked out, are annexed to this complaint.

(5) These two letters, which make clear their origination by the Respondent, bear similarities in terms of their content and tone to another letter whose origination is unknown, and copies of which were circulated during the week of February 14. This latter one-page document made explicit its anti-OPSEU recommendation, and like the other two letters, presented a distorted description of representation by the Applicant.

(6) The effect of the two letters which were clearly originated by the Respondent was to reinforce the message contained in the letter of unknown origin and to heighten the effect of intimidation and undue influence by the Respondent which was independently evident from the Respondent's letters.

(7) Copies of this anti-union propaganda were delivered to employees in the bargaining unit during the silent period ordered by the Registrar.



(8) During the morning voting period on February 24, 1984, the word "NO" was written in large pencilled letters on the voters side of the barrier at the voting booth. This was pointed out by a voter and the word was covered over by a labour relations officer.

(9) The Applicant notified the Board on February 24, 1983 of its intention to file charges under Section 89 concerning matters which would affect the vote that day.

The relief sought by the applicant is as follows:

- (1) The Applicant requests the following relief:
  - (a) That the results of the vote taken February 24, 1983 be set aside;
  - (b) Certification under section 8 of the Act;
  - (c) Alternatively, the ordering of a new vote and an award of damages to the union;
  - (d) A declaration of the Respondent's contravention of the Act and the posting and delivery to employees of notices drafted by the Board indicating the Respondent's undertaking to refrain therefrom in the future.

4. After reviewing the filings in this matter and entertaining the opening submissions of counsel, the Board decided to allow the complainant to argue on the basis of its best case. The facts upon which the complainant relies are set out below.

5. The letters which were forwarded to the employees in the bargaining unit are set out below. The first, dated February 11, 1983 over the signature of Mr. D. Corbett Hamilton, the personnel Director of the Hospital, reads:

The Ontario Public Service Employees Union (OPSEU) has applied for certification as the bargaining agent for the non-laboratory paramedical employees of the Toronto General Hospital. The Ontario Labour Relations Board has directed that a vote by secret ballot be taken to determine if you wish to be represented by the O.P.S.E.U. This vote by secret ballot will be taken on Thursday, the 24th day of February, 1983 between 7:30 a.m. and 10:30 a.m., and 6:00 p.m. and 8:00 p.m., in the North Classroom located in the basement of the Norman Urquhart Wing.

Since you are one of the 277 employees included in this paramedical grouping, it is most important that you vote. On February 24th you will be issued a ballot which asks, "in your employment relations with TGH, do you wish to be represented by OPSEU? ...

Yes or No." The majority decision of those voting will determine the outcome for *all* 277 staff affected. For example, if only 100 people cast their votes and 51 of those people vote one way, the way those 51 vote will bind *all* individuals.

So that you may be clear what the Hospital's position is regarding Union organization, we would like to tell you what TGH's position is and continues to be:

1. an employee is free to join a Union if he/she so wishes, and is equally free not to join it;
2. no person whatever may intimidate or coerce an employee in making his/her decision.

No doubt there are other issues that you will want to consider before making your voting decision, a decision which is yours alone. However, we want to make you aware of the following facts:

1. Over the years, the salaries and benefits paid by TGH to its paramedical employees have been competitive with wages paid to our unionized laboratory paramedical employees or competitive with wages paid for comparable work within Metropolitan Toronto hospitals;
2. All recent and past salary increases have been implemented without the deduction of union dues from your pay cheque. You have, therefore, enjoyed competitive conditions of employment without dues deductions.

We urge you to consider carefully these issues when you cast your ballot on February 24, 1983. All voting will be supervised by the Ontario Labour Relations Board, and your ballot will be secret, thus ensuring your anonymity.

Should you have any questions regarding the contents of this letter, I would be pleased to answer them.

The second, dated February 16, 1983 over the signature of Mr. W.V. Stoughton, the president of the Hospital, reads:

Since you are one of 277 employees included in the paramedical group who will be voting on February 24, 1984, to determine if you wish to be represented by OPSEU in your employment relations with TGH, I would like to further elaborate upon the information presented to you in Mr. Hamilton's letter. Firstly, I wish to make you aware that all 277 employees whose names appear on the voters' list are eligible to vote and you are completely free to vote

whichever way you chose, irrespective of whether or not you previously signed a union card.

Over the years, the paramedical staff, of which you are a member, has apparently had no desire to be represented by a trade union. We believe that this has been due to the Hospital's commitment of providing wage and employment benefits comparable to other metropolitan Toronto hospitals. Consider the following wage facts:

1. Historically, Registered Technologists in the paramedical group have received the same hourly rates as have our unionized (OPSEU, Local 571) laboratory Registered Technologists. These hourly rates compare favourably with those paid in the 38 public hospitals in Ontario with OPSEU bargaining units which were covered by the pattern setting Verity Interest Arbitration Award of 1982.

<i>R.T. Comparisons</i>	<i>Dec.'82 min.-max.</i>	<i>1983 min.-max</i>
Radiological R.T.(non-union)	11.69-13.49	As per provisions of Inflation
Union Laboratory R.T. (TGH OPSEU, Local 571)	11.69-13.49	Restraint Act 5% increase
R.T.'s - '82 Verity Award (Union)	11.69-13.03 *mode - most common max.	

2. Other paramedical health care professionals such as Physiotherapists, Occupational Therapists and Dietitians are paid hourly rates which are higher than the average hourly rates for the same categories reflected in the most recent annual metro Toronto Hospital survey of wages conducted by H.C.M.T. in September 1982.

	<i>TGH Effective Apr. '82 min.-max.</i>	<i>HCMT Average Rate Sept. '82 min.-max.</i>
<i>For example:</i>		
Physiotherapist	12.69-15.01	12.16-14.39
Occupational Therapist	12.69-15.01	12.14-14.36
Dietitian	12.69-15.01	12.04-14.26

3. The formula for OPSEU union dues as it applies to the TGH employees represented by OPSEU is 1.125% of weekly earnings up to \$5.50/week. Based on this formula, a full-time employee earning \$489/week or more would pay union dues of \$286/year.



Certainly, every individual has the freedom of choice as to whether or not he/she wishes to join a union. However, I would urge you to consider the following questions before making your decision:

- (a) What is the philosophy of the OPSEU and its leaders?
- (b) Do you know what the OPSEU's position is respecting strikes in the Hospital sector?
- (c) Can OPSEU influence your wages and benefits in 1983? All employees in the paramedical group are subject to the Inflation Restraint Act (Bill 179) with respect to their compensation plans, and under the provisions of that Act, each employee will remain under controls for a period of 12 months.

In order that the true wishes of the paramedical employees are expressed, it is important that you, as well as your colleagues, exercise your right to vote and vote as each of you alone decide. The ballot will ask, "In your employment relations with TGH, do you wish to be represented by OPSEU? ... Yes or No." The outcome will be determined by the majority of those who vote. If you do not want a union to represent your interests, I would urge you to vote "NO" on election day.

The letter was sent by courier.

6. The third letter referred to in the particulars filed by the respondent, dated February 14, 1983, was presumably drafted by the Association of Allied Health Professionals: Ontario; a rival union. It reads:

*DID YOU KNOW?*

- 1. OPSEU's total membership is approximately 65,000 and the vast majority of these are civil servants. Policy decisions for OPSEU are made by majority votes at the Annual Conventions and representation is by delegates with the number based on the size of the membership of a local. Paramedical employees make up only a small portion of the total membership and there is no special representation for them. OPSEU represents so many different groups (including service employees and office and clerical employees in hospitals) and it is hard to believe that it can fully appreciate the needs and wants of paramedical employees.
- 2. Although OPSEU represents a large number of technologists and technicians it represents very few of the other paramedical disciplines. AAHP:O with its 12 bargaining units represents more of these other groups.

As well, OPSEU's treatment of these other disciplines such as physiotherapy, occupational therapy, pharmacy, social work and psychology varies greatly from hospital to hospital in terms of salaries and the salary differentials between the groups themselves and compared to technologists. For physiotherapists, there can be as much as \$4,000/year variation in salaries between hospitals.

OPSEU operates on the "majority rule" premise and has no provisions to ensure that the special problems of minority disciplines will be given the same attention as problems of the larger groups.

3. OPSEU is actively lobbying for the right to strike for hospital employees. The membership passed a resolution at the union's June, 1982 convention for the union to "commit itself completely to obtaining the (legal) right to strike for all OPSEU members as soon as possible".

Although most of its members do not now have the right to strike, OPSEU has a strike fund towards which it was proposed that 6.8% of the dues or over \$1 million dollars be added in 1982-83.

4. OPSEU's dues structure is such that employees who have higher salaries pay more dues for the same service. The dues are 1.1/8% of an employee's basic salary to a maximum of \$5.50/week (\$23.83/month). Employees earning \$489/week (\$25,428/year) or more pay the maximum.

Of the dues, only approximately 43% goes towards direct service to the membership. The rest goes towards participating in the labour movement (approximately 7%), strike fund (about 7%), convention and meetings (about 7%), education (about 7%) and administrative costs.

Paramedical employees need a union of their own and should not be lumped in with a lot of other employees. One only has to look to the gains being made by the nurses here and organized paramedical employees in British Columbia and Alberta to see the wisdom of that.

The special needs and concerns of paramedical employees go beyond just salary. These problems are not yet being addressed by OPSEU and one questions whether they ever could be given the structure of the union itself. Paramedical employees are professionals who are demanding a greater say in the practice of their discipline and the provision of services to the public. They need the

*undivided* resources of a union directed to their cause and a more participative type of union.

Think about it and then vote *NO* to OPSEU. There are better alternatives available.

7. The Registrar advised the parties that the silent period during which all interested persons are directed to refrain and desist from propaganda and electioneering extended from midnight of Sunday, February 20, 1983 until the vote is taken.
8. Two bargaining unit employees received copies of Mr. Stoughton's letter of February 16th after the commencement of the silent period.
9. During the course of the voting on the morning of February 24th it was discovered that the word "No" had been written on the voters' side of the barrier at the voting booth. The applicant has no knowledge of who pencilled the word "No" on the voters' screen nor how long it was there before it was discovered and removed. In any event, the union scrutineer, who was present throughout the voting, signed the "Confirmation of Conduction of Election" form certifying that "the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote."
10. The complainant argues firstly, that the word "No" written on the ballot screen may have affected the outcome of the vote and, like the wearing of an identification button at the place of voting, is a breach of the silent period and carries on the pattern of anti-union propaganda which commenced with the February 16th letter. The complainant argues, secondly that there is a heavy onus on the employer to establish that all reasonable steps were taken to ensure that the silent period would not be violated. The complainant, while conceding that the letter of February 11th is innocuous, argues thirdly that the letter of February 16th constitutes a subtle adoption of the anti-OPSEU position taken in the letter of February 14th circulated by the rival Allied Health Professionals organization. When pressed by the Board to identify what in the February 16th letter constitutes an adoption of the Allied Health Professionals' letter, the complainant referred to the listing of the rates of pay, the types of personnel for whom rates were set out, the comments with respect to strikes in the hospital sector and the urging of employees to vote against the complainant. The complainant takes the position that the February 16th letter of Mr. Stoughton was designed to convey the employer's preference for the Allied Health Professionals Union and, therefore, goes beyond the employer's freedom of expression and constitutes a violation of section 64 of the Act. Finally, the complainant argues that when the February 16th letter of Mr. Stoughton is read against the backdrop of the unlawful strike which took place at the hospital in 1980, and the disciplinary reprisals of the employer, it must be considered as a threat against bargaining unit employees who might wish to support the complainant. The complainant also maintains that the reference to *Bill 179* and the rhetorical question pertaining to the influence of the complainant over wages and benefits during the 12 month period of *Bill 179's* operation is not factual and is misleading.
11. We have reviewed the letters forwarded to all bargaining unit employees by the Hospital in the context of the Hospital's response to the prior unlawful strike



engaged in by members of another union in 1981 and in the context of the letter presumably sent to employees by the rival Allied Health Professionals on February 14th and are unable to find in their content any violation of the Act. The employer's communications were within the bounds of the freedom of expression guaranteed under section 64 of the Act and do not evidence a preference for one union over another or constitute coercion, intimidation, threats, promises or undue influence within the meaning of section 64 of the Act. (See *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189.) Accordingly, we hereby confirm our oral ruling at the hearing that there has been no employer violation of section 64.

12. While the delivery of the letter of February 16th to 2 employees (of the 285 on the voters' list) constitutes a breach of the silent period, it is not of such a nature as would cause the Board to take any action. Accordingly, we hereby confirm our oral ruling that there has not been a breach of the silent period as would cause the Board to take any action.

13. There is no evidence as to who wrote the word "NO" on the back of the voters' screen. We think it is safe to speculate that one of the employees who voted also wrote the word on the screen. There is no evidence as to how long it remained there. It was covered over by the Board's Returning Officer when it was observed. Notwithstanding the fact that the word was on the back of the screen for an indefinite period, the union scrutineer certified that all eligible voters were given the opportunity to cast their ballots in secret and that the ballot box was protected in the interest of a fair and secret vote. In these circumstances we are not prepared to conclude that the employer is guilty of any breach of the Act in this regard or that the environment within which the vote took place was contaminated to the extent that the Board should disregard the results of the vote which was taken on February 24, 1983.

14. We have reviewed all of the evidence in this matter and reiterate that no employer violation of the Act is established. Furthermore, on the facts relied upon by the complainant, we are not prepared to interfere with the vote which was taken on February 24, 1983.

15. Accordingly, we hereby find that on the taking of the representation vote directed by the Board not more than fifty per cent of the ballots cast were cast in the favour of the applicant.

16. The application is therefore dismissed.

17. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date hereof.

18. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

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**1620-82-R Graphic Arts International Union, Applicant, v. Total Marketing Incorporated, Respondent**

Practice and Procedure – Related Employer – Wholly-owned subsidiary making assignment in bankruptcy – Monetary award at arbitration remaining unsatisfied – Union seeking declaration that parent company related employer – Section meant only to preserve bargaining rights – Board not making declaration in circumstances

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members E. J. Brady and A. Hershkovitz.

**APPEARANCES:** *Geoffrey A. Beasley for the applicant; no one appearing for the respondent.*

**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER E. J. BRADY; April 29, 1983**

1. This is an application under section 1(4) of the Act. Section 1(4) provides:
 

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(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one operation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.
2. The facts are not in dispute. The applicant has a bargaining relationship with Sepcographics Incorporated, which is a wholly owned subsidiary of the respondent Total Marketing Incorporated. In an arbitration award dated August 21, 1981, it obtained an order for the payment of \$3,403.39 against Sepcographics Incorporated. Sepcographics Incorporated was insolvent at the time of the arbitration and subsequently made an assignment in bankruptcy. The full amount of the arbitration award remains unsatisfied. By this application the applicant seeks to put itself in a position to realize its arbitration award, now registered in the Court as a judgment debt, against the respondent Total Marketing Incorporated.
3. The material before the Board establishes that the two corporate entities are under common control and direction, and would qualify as related companies within the meaning of section 1(4) of the Act. This is not a case, however, where the Board should exercise its discretion to declare that Total Marketing Incorporated is a related employer for the purposes of the Act.
4. It is clear that Sepcographics Incorporated has ceased operations, and that the work which it performed is no longer being done. There has been no transfer of work, and in that sense no undermining or erosion of the applicant's bargaining rights. If it

appeared on the material before us that the respondent had spun off a similar company to do identical work the case might be more compelling for relief, whether by way of declaration of successorship under section 63 of the Act or by the application of section 1(4). In those circumstances the Board could, by the operation of section 1(4) pierce the corporate veil in the interests of protecting the bargaining rights. (See e.g., *Devon Studio*, [1980] OLRB Rep. July 961). Those facts are not shown in the instant case. The purpose of section 1(4) of the Act is to preserve bargaining rights. It is not intended to give a party to a collective agreement the right to a “deep pocket” recovery of an unsatisfied debt against a related corporation.

5. The *Labour Relations Act* is predicated on the free choice of employees. It is also drafted in contemplation of the existing economic order, with due allowance for the realities of commercial law, including principles of limited liability for corporations. While section 1(4) provides an exception to that law for a limited purpose, that purpose must always be kept in mind. The section was not intended to extend bargaining rights, nor should it be used to extend the liabilities that arise under them, when bargaining rights have not in fact been transferred or undermined. (cf. *Re Cassin-Remco Ltd.*, [1980] 105 D.L.R. (3d) 138 (Ont. H.C.)). The Board should not generally allow a union with bargaining rights for the employees of a subsidiary to use section 1(4) to automatically obtain a declaration that its bargaining rights extend to the parent company and its employees, or to a sister company. We do not see why the consequences should be any different simply because the subsidiary has become insolvent. (cf. *Chandelle Fashions*, [1982] OLRB Rep. June 828 at 848–49).

6. The Board is not without sympathy for the hardship suffered by the applicant. It is left with an uncollectable bad debt. That result, however, is a risk that unions and employees have always assumed like all participants in the economic marketplace. Whether employees of a bankrupt subsidiary or their union should have a claim for an unpaid debt against a parent company that is solvent is a policy question of substantial consequence best resolved legislatively. It is not a result that should, absent clear and unequivocal language in the Act, be ushered in by this Board through a novel interpretation or application of section 1(4).

7. For the foregoing reason the application is dismissed.

#### **DECISION OF BOARD MEMBER AL HERSHKOVITZ;**

1. In dissenting with the decision of the Board I must point out as the majority did that:

- (a) The facts are not in dispute.
- (b) The material before the Board establishes that the “two corporate *entities are under common control and direction* and would qualify as related companies within the meaning of section 1(4) of the Act”.

2. I submit that section 1(4) of the Act gives the Board discretionary powers by the very language in which it is framed and I quote, “*Where in the opinion of the Board*



*associated or related activities or business are carried on, whether or not simultaneously by, or through more than one operation, individual, firm, syndicate or association or any combination thereof, under common control or direction the Board may upon the application of any person, trade union or council of trade unions concerned, treat the corporation, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise as it may deem appropriate".*

3. If one examines the facts as related by the applicant and agreed to by all parties in light of labour relations rather than "allowances for the realities of commercial law", one must come to the conclusion that the legislative intent of section 1(4) was to remove issues such as this from the "realities of commercial law" and bring it into the *realities of labour law*.

4. The majority decision makes much of the fact that "if it appeared on the material before us that the respondent had spun off a similar company to do identical work the case might be more compelling for relief". However, it was the respondent that was totally responsible for determining the direction that Sepcographics Incorporated would take, since Total Marketing Incorporated had a hand in glove relationship rather than an arms length relationship with Sepcographics Incorporated.

5. To argue that because Total Marketing Incorporated did not form another company to continue to the function of Sepcographics Incorporated, and therefore is freed from any financial responsibility to what is in the final analysis its work force, even though it may be through another party would open the door for a practice that would be inimical to the very principles as envisioned by our legislature and as spelled out in section 1(4) of the Act.

6. In light of the foregoing I would grant the applicant the relief asked for under section 1(4) of the Act.

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**1727-82-U** International Association of Machinists and Aerospace Workers, Complainant, v. **Treco Machine & Tool Ltd.**, Respondent

**Interference in Trade Unions – Unfair Labour Practice – Grievor known union supporter – Previously unlawfully discharged and reinstated by Board – Whether subsequent transfer motivated by business considerations or union activity – No violation found**

**BEFORE:** Rory F. Egan, Vice-Chairman, and Board Members J. Wilson and A. HersHKovitz.

**APPEARANCES:** *Elizabeth J. Shilton Lennon, Len Froggatt, Keith Wall and Karl Wagner for the complainant; G. Grossman, L. Treml and G. Alex for the respondent.*

**DECISION OF RORY F. EGAN, VICE-CHAIRMAN AND BOARD MEMBER J. WILSON;** April 28, 1983

1. This is an application under section 89 of the *Labour Relations Act* in which it is alleged that the respondent has dealt with Keith Wall contrary to sections 64, 66 and 70 of the Act.

2. The complaint is that the company transferred Wall from his position of inspector to that of a production assistant on or about May 13th, 1982. It is the position of the union that this transfer was a demotion and was engineered by the company as part of a continuing campaign on the part of the company to harass and embarrass Wall who, it has been established, was instrumental in bringing the union into the plant.

3. The charge of harassment was related to the fact that the company had discharged Wall on January 21, 1981. That matter came before the Board in February, 1981. The Board found that Keith Wall was discharged contrary to the provisions of section 58(a) of the Act and directed that he be reinstated with full compensation. This decision is dated May 25th, 1981 with reasons issued on February 2, 1982.

4. The company was also before the Board again in November 1982, as a result of which the Board found, (December 7, 1982) *inter alia*:

17. We are also compelled to conclude that the company's refusal to execute a collective agreement on the basis of the terms of settlement proposed by it (with the single exception of article 3.03 which we have found to have been an unlawful demand) constitutes an unlawful attempt to repudiate the union as the lawfully certified bargaining agent of its employees and to deal directly with these employees. The refusal of the employer to execute a collective agreement on the basis of the terms of settlement proposed by it constitutes a breach of sections 15 and 64 of the Act.

and directed the company to sign a draft agreement which was presented to it for signature on September 7, 1982. The company has not signed the agreement and has sought judicial review of the decision. In addition the complainant alleges that he was denied the normal semi-annual wage increase given other employees.

5. It is the position of the company that Wall's transfer was the result of a change in production from simple, uncomplicated (and what might be termed mass-produced products) to more complex products requiring highly-skilled persons to produce. In addition to the change in complexity of the product, the company lost such an overall volume of production that its work force has been reduced within the last two years by about 50 per cent. A further factor affecting the work of Wall was that the customers were demanding zero defect production. It was the company's further position that with the change from mass production work to low quantity, high technology equipment, it needed fewer but more highly-skilled inspectors.

6. The evidence was that in its earlier years the company had been in the business of supplying parts to the aircraft industry. In this business highly-skilled persons were required, and inspectors were all persons with toolmaking backgrounds. When the mass-production era came in and the product was less finely designed and complicated, inspectors were recruited from production machinists and not from a toolmaker classification. The company took the position that with the return to the production of highly-technical equipment and the disappearance of the mass-produced items, the required calibre of the inspectors again became such as to need a toolmaking background, and the number of inspectors, because of low volume production, decreased.

7. The company maintained that it was as a result of the change in volume and kind of items produced that Wall was transferred to the production department whence he had originally come. The particular reason for transferring Wall was that he did not have the toolmaker background that the company now required in its inspectors.

8. The process of transferring inspectors to the production area commenced about one year prior to Wall's transfer when two inspectors were transferred out of that classification. At the time of Wall's transfer in May another inspector, Brian Ling, was also moved into the production area. Wall stated that this was to be temporary. The company pointed out that with the exception of Wall, these transfers were made without protest from the persons involved. The inspections formerly done by Wall are now being done by the manager(s) of the milling department, foremen and supervisors. Tool room inspection is done by a foreman. The evidence is that the background of these foremen is in toolmaking. Mr. Wall's pre-inspection work was that of production machinist. The evidence of the company is that the work Wall was doing is now being phased out and that what is left of it is being done by a supervisor.

9. At the time of his transfer Wall's inspector's rate was maintained as a "red circled" or premium rate. The same applied to others who were transferred from inspection to production, including two former foremen.

10. The company was well aware of Wall's pro-union activity. He was, in fact, a member of the bargaining committee, as well as having been active in promoting membership in the union. The company argued that its knowledge of Wall's connection with the union had nothing to do with his transfer. The move, the company mentioned, was based upon economics, quality demands and change of work and Wall was simply one of a number of inspectors affected by the company's response to these factors.



11. The union and Wall contend that the latter is qualified to do the inspections now being done and that the only reason he has been transferred to production is because of his support of the union. Wall stated that he is more qualified than a journeyman toolmaker and that he has been an inspector for 7½ to 8 years without complaint from the company. He has, however, had no toolmaker experience and has taken no courses leading to the acquisition of the skills of that trade. However, as we understand it, Wall is claiming that it is as an inspector that he is more qualified and not as a toolmaker. His evidence is that he had been involved in everything in inspection, including the inspection of tools. He remarked that the company did not know that he could not inspect until the union came in. He testified he had worked on the "Board" and that was where inspection of tools came in. He explained that Board work involves "inter stage" inspection, that is, inspection of components and tools moving from one department to another, as well as final inspection, that is, where items were on their way out to customers.

12. Ernest Bauer, chief inspector for the company and a journeyman toolmaker, testified that Wall, when production declined, was put on the Board – that is a section or place in the plant where items come for final inspection for products moving from department to department, or if all manufacturing has finished, out to the customer. Bauer's evidence was that Wall did work on the Board but either selected the simpler inspection tasks or worked under close supervision. Bauer said that insofar as the more complex items were concerned, Wall was unable to interpret the drawings or blueprints to engineering standards required. He also was required to select the methods of setup and because of his lack of skill had to be shown every particular step. He acknowledged that Wall had used production pictures and process sketches but said these did not require any use of skilled trade knowledge, whereas on the complex jobs now being done no process drawings were provided and it was necessary for an inspector to be able to read blueprints. The need to instruct Wall, because of his lack of ability to read blueprints and do the setups, caused bottlenecks in the production and resulted in Bauer having to seek help. Bauer testified that he had had to ask management for people with a toolmaker background who were familiar with blueprints and knew what jigs and setups were required. Bauer stated that the lack of ability to read blueprints on the part of Wall had caused delay, increased the chance of missing points and had thus invited rejects. It was the lack of toolmaker training that convinced Bauer that Wall could not handle the complex jobs.

13. The onus of establishing the legitimacy of its actions and of demonstrating that anti-union motivation formed no part in its decisions is upon the employer. The key element in that onus is the presence or absence of anti-union animus. The Board is aware that the past conduct of the company cannot predetermine the issue of animosity; nevertheless, it is relevant and necessary for the Board to take into account the course of conduct of the employer in its ongoing relationship with the union in order to be able to reach a proper decision with respect to its transfer of Wall and the question of his wages (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220). The Board is also aware of the fact that every employee remains subject to the legitimate actions of his employer in adjusting his work force to meet the genuine needs of his enterprise. Thus, not every move that adversely affects an employee who is active in the union is prohibited, nor is such an employee entitled, unless the collective agreement so provides, to special

consideration, provided, of course, that no taint of anti-unionism is attached to what might appear to be a business-like action.

14. The Board has carefully weighed the evidence in the present case and has come to the conclusion that Wall's transfer arose out of a change in volume and type of product that affected not only Wall but other employees in the same classification, all of whose lack of toolmaking experience and ability to read blueprints and make the necessary setup required to inspect the complicated parts jeopardized their ability to execute the changed jobs and resulted in their transfer. It is our finding that Wall was caught in a general reorganization of the inspection staff that had nothing to do with his union affiliation. The same applies to the matter of the wage increase.

15. The Board notes that the company has given its undertaking that Wall will be reappointed to the same type of inspection work he had previously done as soon as production volume and product type warrant it. We also note that the company has undertaken to maintain Wall's red-circle rate and that he will obtain an increase as soon as the rates are equalized.

16. The complaint is accordingly dismissed.

#### **DECISION OF BOARD MEMBER A. HERSHKOVITZ;**

1. In dissenting from the decision of the majority, I wish to point out:

- (a) That the respondent has a history of harassment against Keith Wall for his union activity; and by a decision of the Board dated May 25, 1981, Keith Wall was ordered reinstated with full compensation.
- (b) The company has further shown its anti-union bias by refusing to execute a collective agreement on the basis of the terms of settlement proposed by it. On December 7th, the Board directed the company to sign the draft agreement which was presented to it.
- (c) Keith Wall was an active participant both in the union's organizing drive, as well as in the negotiations.
- (d) While the company argues that Mr. Wall's transfer is the result of a change of production, I submit that the company's previous behaviour might still leave the impression in the eyes of the employees of Treco Machine & Tool Ltd. that it maintains its anti-union animus and is reflected in its transfer of Mr. Wall.
- (e) It is an axiom that a company should not only be free of anti-union animus but should also appear to be free of such animus.

2. In order to fulfill that obligation, I would order that not only should Mr. Wall retain his red-circle rate, but any increments that might otherwise be due as an inspector should be paid to him.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD MARCH 1983

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**2490-81-R:** Labourers' International Union of North America, Local 607, (Applicant) v. Nicholls-Radtke & Associates Limited, (Respondent) v. The Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**0205-82-R:** Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, (CLC, AFL, CIO), (Applicant) v. MacLeans Magazine, (Respondent).

Unit: "all employees of the respondent employed in the editorial department of MacLeans Magazine, in the Province of Ontario, save and except Publisher, Editor, Deputy Editor, Managing Editor, Assistant Managing Editor, Editorial Controller, Assistant to Editor, Art Director, Assistant Art Director, Photo Editor, Ottawa Bureau Chief, Chief of Research, secretaries of the Editor, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (72 employees in unit). (*Clarity Note*).

**0229-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. DI-AL Construction Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

**0229-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. DI-AL Construction Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell,

excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

**0493-82-R:** United Steelworkers of America, (Applicant) v. Fildebrandt Precision Industries Limited, (Respondent).

Unit: "all employees of the respondent in the City of Kanata, save and except foremen, persons above the rank of foreman, office and sales staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (32 employees in unit).

**1009-82-R:** Ontario Public Service Employees Union, (Applicant) v. Industrial Resource Centre, (Respondent).

Unit: "all employees of the respondent at Windsor, Ontario, save and except shop superintendent and persons above the rank of shop superintendent, office and clerical staff and tool crib technicians." (17 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1606-82-R:** Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC, AFL, CIO), (Applicant) v. The Spectator, A Division of Southam Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees in the Editorial Department of the respondent in the Province of Ontario, save and except the Editor, Managing Editor, Assistant Managing Editor, Associate Editor, Metro Editor, District Editor, Sports Editor, Entertainment Editor, Night Metro Editor, Wire Editor, Editor – Editorial Page, Systems and Development Editor, Chief of Photography, Head Librarian, Secretary to the Managing Editor, Secretary to the Editor, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (24 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees in the Editorial Department of the respondent in the Province of Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the Editor, Managing Editor, Assistant Managing Editor, Associate Editor, Metro Editor, Wire Editor, Editor – Editorial Page, Systems and Development Editor, Chief of Photography, Head Librarian, Secretary to the Managing Editor and Secretary to the Editor." (124 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1766-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. F. W. Woolworth Co. Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at 290 Humberline Drive Avenue West and 2220 Midland Avenue in Metropolitan Toronto, save and except foremen, those above the rank of foreman, office, sales and clerical staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (177 employees in unit).

Unit #2: (*See Application for Certification Dismissed – No Vote Conducted*).

Unit #3: (*See Applications for Certification Dismissed – No Vote Conducted*).

**1817-82-R:** Food and Service Workers of Canada, (Applicant) v. Abbey National Holdings Limited carrying on business as Abbey Carpet Cleaning Services, (Respondent).

Unit: "all dependent contractors engaged by the respondent at and out of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, sales persons, office staff,

regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (68 employees in unit). (*Having regard to the agreement of the parties*).

**1877-82-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Fisons Western Corporation, (Respondent).

Unit: “all employees of the respondent at St. David’s, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (8 employees in unit). (*Having regard to the agreement of the parties*).

**2269-82-R:** Local Union 636 of the International Brotherhood of Electrical Workers, (Applicant) v. Niagara-On-The-Lake Hydro Electric Commission, (Respondent).

Unit: “all employees of the respondent at Niagara-On-The-Lake, Ontario, save and except foremen, persons above the rank of foreman, office staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**2331-82-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. United Moulding Limited, (Respondent #1) v. John Thomas Batts Enterprises (Canada) Ltd., (Respondent #2).

Unit #1: “all employees of respondent #1 at Hawkesbury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (37 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of respondent #2 at Hawkesbury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (14 employees in unit). (*Having regard to the agreement of the parties*).

**2333-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Trades & Labour Club, (Respondent).

Unit: “all employees of the respondent at Brantford, save and except manager and persons above the rank of manager.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**2334-82-R:** Canadian Union of Public Employees, (Applicant) v. St. Joseph’s Villa, (Respondent).

Unit: “all employees of the respondent in the City of Cornwall, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses and office staff.” (56 employees in unit). (*Having regard to the agreement of the parties*).

**2354-82-R:** London and District Service Workers’ Union, Local 220, SEIU, ALF, CIO, CLC, (Applicant) v. Nel-Gor Castle Rest Home, (Respondent).

Unit: “all employees of the respondent employed in London, Ontario who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff.” (4 employees in unit). (*Having regard to the agreement of the parties*).



**2355-82-R:** London and District Service Workers' Union, Local 220 SEIU, AFL, CIO, CLC, (Applicant) v. Nel-Gor Castle Rest Home, (Respondent).

Unit: "all employees of the respondent employed in London, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

**2363-82-R:** Hotels, Clubs, Restaurants, and Tavern Employees Union, Local 261, (Applicant) v. Citicom Inc. c.o.b. as Windsor Tavern, (Respondent).

Unit #1: "all employees of the respondent at the Windsor Tavern, 134 Queen Street, Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (5 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at the Windsor Tavern, 134 Queen Street, Windsor, Ontario, regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor." (4 employees in unit). (*Having regard to the agreement of the parties*).

**2364-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Yorkwood Investments Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

**2365-82-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Lakeview Estates, 502665 Ontario Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

**2366-82-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Nicholas J. Campbell Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of

Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**2373-82-R:** Service Employees Union, Local 204, affiliated with the SEIU, AFL, CIO, CLC, (Applicant) v. General Refrigeration, a division of Intermetco Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, sales staff, and office and clerical staff.” (82 employees in unit). (*Having regard to the agreement of the parties*).

**2386-82-R:** Canadian Transportation Workers Union No. 200 National Council of Canadian Labour, (Applicant) v. Laidlaw Waste Systems Ltd., (Respondent).

Unit: “all employees of the respondent at Barrie, Ontario, save and except foremen, persons above the rank of foreman, office staff and regularly employed for not more than twenty-four (24) hours per week.” (10 employees in unit). (*Having regard to the agreement of the parties*).

**2394-82-R:** Stillmeadow Workers Association, (Applicant) v. Stillmeadow Farms A Div. of Maple Leaf Mills Ltd., (Respondent).

Unit: “all employees of the respondent in the Township of Pilkington, Ontario, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office and sales staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (100 employees in unit).

**2396-82-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees, International Union Local 351, (Applicant) v. 414594 Ontario Limited carrying on business as Thrifty Donut Shop, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**2403-82-R:** Canadian Union of Public Employees, (Applicant) v. Centro-Clinton Day Care Centre, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors and persons above the rank of supervisor.” (6 employees in unit). (*Having regard to the agreement of the parties*).

**2443-82-R:** Aluminum, Brick and Glass Workers International Union, AFL, CIO, CLC, (Applicant) v. National Pressed Glass Division of Domglas Inc., (Respondent).

Unit: “all office and clerical employees of the respondent in Brantford, save and except supervisors, persons above the rank of supervisor, financial accounting clerk, and persons covered by subsisting collective agreement.” (3 employees in unit). (*Having regard to the agreement of the parties*).

**2451-82-R:** Canadian Union of Public Employees, (Applicant) v. Family Day Care Services, (Respondent) v. Group of Employees, (Objectors)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, day care providers, administrative staff and students employed during the school vacation period or participating in field placement programs of an educational institution." (24 employees in unit). (*Having regard to the agreement of the parties*).

**2454-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. BBC Distributors Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of BBC Distributors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of BBC Distributors Limited in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**2461-82-R:** Canadian Union of Public Employees, (Applicant) v. The Students' Union Corporation of The Algonquin College of Applied Arts and Technology, (Respondent).

Unit: "all employees of the respondent working at or out of the City of Ottawa, Ontario, save and except the General Manager, persons above the rank of General Manager, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (10 employees in unit). (*Having regard to the agreement of the parties*).

**2462-82-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Discus Records, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**2463-82-R:** The Canadian Union of Public Employees, (Applicant) v. The Corporation of the City of Chatham – Victoria Home, (Respondent).

Unit: "all employees of the respondent at its Victoria Home regularly employed for less than 24 hours per week and students employed for less than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and registered and graduate nurses." (13 employees in unit). (*Having regard to the agreement of the parties*).

**2464-82-R:** Canadian Union of Public Employees, (Applicant) v. Corporation of the County of Oxford (Oxford County Social Services), (Respondent).

Unit: "all employees of the respondent in its Social Services Department in the County of Oxford, save and except the Administrator, Assistant Administrator, Executive Secretary,



Supervisors, and employees covered under the existing agreement between the applicant and the respondent dated June 26, 1981.” (14 employees in unit). (*Having regard to the agreement of the parties*).

**2476-82-R:** Toronto Typographical Union, Local 91, (Applicant) v. Trio Press Limited, (Respondent) v. Employee, (Objector).

Unit: “all employees of the respondent in the City of Mississauga, save and except foremen and persons above the rank of foreman, office and sales staff and students employed during the school vacation period.” (8 employees in unit). (*Having regard to the agreement of the parties*).

**2486-82-R:** International Ladies’ Garment Workers’ Union, (Applicant) v. Aline Marelle Ltd., (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, mechanics, designers, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (46 employees in unit). (*Having regard to the agreement of the parties*).

**2490-82-R:** International Union of Operating Engineers, Local 792, (Applicant) v. C & M McNally Engineering Inc., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**2503-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Best For Less Drug Stores, (Respondent).

Unit: “all employees of the respondent employed in its retail drug stores in the municipalities of Metropolitan Toronto, Markham, Richmond Hill, Newmarket, Pickering, Hamilton, Burlington, Clarkson, Ancaster, St. Catharines, Niagara Falls, Thorold, Stoney Creek, Dundas, Port Colborne, Welland, Galt, Streetsville, Oakville, Brampton, Bramptford, London, St. Thomas, Mitchell, St. Mary’s, Blenheim, Stratford, Woodstock, Tillsonburg, Aylmer, Owen Sound, Hanover, Oshawa, Belleville, Peterborough, Port Hope, Trenton, Cobourg, Bowmanville, Whitby, Lindsay, Napanee, Barrie, Vespra Township, Parry Sound, Collingwood, Orillia, Penetang, Bracebridge, Huntsville, Gravenhurst, Orangeville, Brockville, Smiths Falls, Morrisburg, Perth, Prescott, Cornwall, Arnprior, Renfrew, Gananoque, Ottawa, and Kingston. Save and except: Front Store Managers, and persons above the rank of Front Store Manager, graduate and undergraduate Pharmacists including Pharmacy Interns and Apprentice Pharmacists.” (30 employees in unit). (*Having regard to the agreement of the parties*).

**2513-82-R:** Ontario Nurses’ Association, (Applicant) v. Spencer Bros. Nursing Home, (Respondent).



Unit: "all registered and graduate nurses employed in a nursing capacity by the (Respondent) in Hagersville, Ontario, save and except the administrator and those above the rank of administrator." (3 employees in unit). (*Having regard to the agreement of the parties*).

**2514-82-R:** Ontario Nurses' Association, (Applicant) v. Teck Pioneer Residence, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Kirkland Lake, Ontario, save and except the Director of Nurses and persons above the rank of Director of Nurses." (9 employees in unit). (*Having regard to the agreement of the parties*).

**2522-82-R:** Retail Clerks Union, Local 1977 chartered by the United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Zehrs Markets (a Division of Zehrmart Limited), (Respondent).

Unit: "all employees of the respondent at its retail store at Cambridge Mall, 150 Holiday Inn Drive, Cambridge (H), Ontario, save and except the store manager and persons above the rank of store manager." (43 employees in unit). (*Having regard to the agreement of the parties*).

**2528-82-R:** United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Brooke Bond Inc. (Respondent).

Unit: "all employees of the respondent at 315 University Avenue in Belleville, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff, quality control staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (79 employees in unit). (*Having regard to the agreement of the parties*).

**2558-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Bob Labrie Cabs, (Respondent).

Unit: "all employees of the respondent in the City of Gloucester, Ontario, save and except owner/supervisor and persons above the rank of owner/supervisor." (3 employees in unit). (*Having regard to the agreement of the parties*).

**2560-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Blue Line Taxi Co. Limited, (Respondent).

Unit: "all employees of the respondent employed as single plate owner operators licensed by the City of Gloucester, save and except supervisors and those above the rank of supervisor." (13 employees in unit). (*Having regard to the agreement of the parties*).

**2585-8-R:** United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Capform Inc., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, and the geographic townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

**2614-82-R:** Retail, Wholesale and Department store Union, AFL, CIO, CLC, (Applicant) v. 408236 Ontario Limited (Dowling Motor Hotel), (Respondent)

Unit #1: "all employees of the respondent at Dowling, Ontario, save and except managers, persons above the rank of manager and persons regularly employed for not more than twenty-

four (24) hours per week.” (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at Dowling, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except managers and persons above the rank of manager.” (4 employees in unit). (*Having regard to the agreement of the parties*).

**2631-82-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Applicant) v. Calorific Construction Company, (Respondent).

Unit #1: “all boilermakers and boilermakers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

Unit #2: “all boilermakers and boilermakers’ apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

### Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

**1303-82-R:** Christian Labour Association of Canada, (Applicant) v. Vision Rest Home, (Respondent).

Unit: “all employees of the respondent in the City of Sarnia regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except registered nurses, supervisors, persons above the rank of supervisor, and office staff.” (7 employees in unit).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		3
Ballots segregated and not counted		1

**2233-82-R:** Energy and Chemical Workers Union, CLC, (Applicant) v. Richvale Block & Ready Mix, Division of Canfarge Ltd., (Respondent) v. United Cement, Lime, Gypsum and Allied Workers International Union AFL, CIO, CLC, (Intervener).

Unit: “all employees of the respondent at its block plants in Richmond Hill, Ontario and the Borough of Etobicoke, Ontario save and except foremen, persons above the rank of foreman and office staff.” (39 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		39
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant		24
Number of ballots marked in favour of intervener		3

**2275-82-R:** Canadian Union of Restaurant and Related Employees, (Applicant) v. Foodcorp Ltd., (Respondent) v. Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Intervener).

Unit: “all employees of the respondent employed at 2990 Eglinton Avenue East in the Borough of Scarborough in the Municipality of Metropolitan Toronto in the Province of Ontario, save

and except hostesses and persons above the rank of hostess." (63 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list at start of vote		66
Number of persons who cast ballots	44	
Number of ballots marked in favour of applicant		41
Number of ballots marked in favour of intervener		3

**2277-82-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Silverwood Dairies, Division of Silverwood Industries Limited, (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101, (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except plant protection employees, office staff, chief engineers, foremen, milk route foremen, those above the rank of foreman and milk route foreman, territory salesman, persons covered by subsisting collective agreements and persons engaged on a casual basis to replace regular employees who are off work due to sickness or accident provided such period is less than twenty-four (24) hours per week." (264 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		259
Number of persons who cast ballots	231	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		163
Number of ballots marked in favour of intervener		65
Ballots segregated and not counted		1

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**2324-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Eplett Dairies Company Limited, (Respondent).

Unit: "all employees of the respondent at Bramalea, save and except supervisors, persons above the rank of supervisor, office staff, sales staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (220 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		219
Number of persons who cast ballots	214	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		122
Number of ballots marked against applicant		88
Ballots segregated and not counted		1

### Applications for Certification Dismissed – No Vote Conducted

**0165-82-R:** United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, (Applicant) v. Manacon Construction Limited, (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener #1) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, (Intervener #2). (9 employees in unit).

**0212-82-R:** United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, (Applicant) v. M. Sullivan and Son Limited, (Respond-



ent) v. Labourers' International Union of North America, Local 527, (Intervener #1) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, (Intervener #2) v. Labourers' International Union of North America, Local 247, (Intervener #3). (30 employees in unit).

**0227-82-R:** United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, (Applicant) v. D'Angelo Plastering Company Limited, (Respondent) v. Labourers' International Union of North America, Labourers' International Union of North America, Local 527, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing and water proofing in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing and water proofing in the employ of the respondent in all other sectors in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, the County of Renfrew, the Regional Municipality of Ottawa-Carleton, the United Counties of Prescott and Russell, and the United Counties of Stormont, Dundas and Glengarry, save and except foremen and persons above the rank of foreman." (3 employees in unit).

**0258-82-R:** United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, (Applicant) v. Leader Structures (Ontario) 1980 Limited, (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener #1) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, (Intervener #2).

Unit: "all construction labourers in the employ of the respondent in the Counties of Carleton, Lanark, Russell, Prescott, Dundas, Stormont and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (22 employees in unit). (*Clarity Note*).

**0374-82-R:** United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Province of Ontario, (Applicant) v. S. R. Lentz Construction Incorporated, (Respondent). (2 employees in unit).

**1766-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. F. W. Woolworth Co. Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #2: "all employees of the respondent at 290 Humberline Drive working in the function identified as 8750 and at 277 Humberline Drive in Metropolitan Toronto, save and except foremen, those above the rank of foreman, office, sales and clerical staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (177 employees in unit). (*Having regard to the agreement of the parties*).

Unit #3: "all employees of the respondent at 290 Humberline Drive working in the function identified as 8750 and at 277 Humberline Drive in Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, and office, sales and clerical staff." (177 employees in unit). (*Having regard to the agreement of the parties*).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*)

**2272-82-R:** Canadian Union of Public Employees, (Applicant) v. The Children's Aid Society of Brant, (Respondent). (10 employees in unit).



**2294-82-R:** Service Employees Union Local 204, affiliated with the AFL, CIO, CLC, (Applicant) v. The Parkdale Nursing Homes (1975) Limited, (Respondent) v. Group of Employees, (Objectors). (59 employees in unit).

**2341-82-R:** Canadian Union of Public Employees, (Applicant) v. The Doctors Hospital, (Respondent).

Unit: "all employees of the respondent in Toronto, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, office and clerical personnel, supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (43 employees in unit). (*Having regard to the agreement of the parties*).

**2390-82-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Applicant) v. Calorific Construction Company, (Respondent). (7 employees in unit).

**2563-82-R:** Sheet Metal Workers' International Association Local Union 537, (Applicant) v. York Steel, (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers Local Union 736, (Intervener). (2 employees in unit).

#### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**0878-82-R:** Service Employees Union, Local 204 affiliated with the AFL, CIO, CLC, (Applicant) v. Dewson Private Hospital Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except registered nurses, graduate nurses, undergraduate nurses, paramedical employees, supervisors, persons above the rank of supervisor, office staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (31 employees in unit).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		8
Ballots segregated and not counted		6

**2162-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Stratford Hotel, (Respondent).

Unit: "all employees of the respondent at Stratford save and except Assistant Manager, persons above the rank of Assistant Manager and office staff." (40 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		39
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		19

**2185-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Holiday Inn London City Centre Complex of the Commonwealth Holiday Inns of Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 299 and 300 King Street, London, save and except supervisors, persons above the rank of supervisor, office and sales staff, security staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (240 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		181
Number of persons who cast ballots	161	
Number of ballots marked in favour of applicant		49
Number of ballots marked against applicant		112

**2232-82-R:** Energy and Chemical Workers Union CLC, (Applicant) v. Century Concrete Products Limited, (Respondent) v. United Cement, Lime, Gypsum and Allied Workers International Union, AFL, CIO, CLC, (Intervener).

Unit: "all employees of the respondent at its plant in Agincourt, save and except foremen, persons above the rank of foreman and office staff." (14 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	14	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		1
Number of ballots marked in favour of intervener		12

**2249-82-R:** Canadian Paperworkers Union, (Applicant) v. Lawson Packaging, A Division of Lawson & Jones Limited, (Respondent) v. Graphic Arts International Union, Local 211, (Intervener).

Unit: "all employees of the respondent located in Scarborough, save and except foreman, those above the rank of foreman, office and clerical staff, sales and technical staff, and those employees who fall within the Lithographing bargaining unit." (136 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		138
Number of persons who cast ballots	133	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		43
Number of ballots marked in favour of intervener		89

**2254-82-R:** Energy and Chemical Workers Union, CLC, (Applicant) v. The Richvale Cartage Limited, (Respondent) v. United Cement, Lime, Gypsum & Allied Workers International Union, AFL, CIO, CLC, (Intervener).

Unit: "all employees of The Richvale Cartage Limited, at its plant/s in the Municipality of Town of Markham and Borough of Etobicoke, save and except foremen, persons above the rank of foreman and office staff." (14 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant		3
Number of ballots marked in favour of intervener		7
Ballots segregated and not counted		3

### Applications for Certification Dismissed Subsequent to a Post Hearing Vote

**1819-82-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Marchant Property Management, (A Division of Marchant & Company Ltd.), (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

Unit: "all employees of the respondent employed at 740 and 746 Midland Avenue, Scarborough, Ontario engaged in cleaning and maintenance, including resident superintendents, save and except property managers, and persons above the rank of property manager, office and clerical staff and regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		1
Number of ballots marked in favour of no trade union		2
Number of ballots marked in favour of intervener		0

**2226-82-R:** Graphic Arts International Union, Local 542, (Applicant) v. Brant Screen Craft Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Brantford, save and except foremen, persons above the rank of foreman, office and sales personnel, persons employed for less than 24 hours per week and students employed during the school vacation period." (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		6
Ballots segregated and not counted		1

**2255-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Budget Rent a Car, A Division of 500770 Ontario Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the cities of Ottawa and Gloucester, save and except location managers and persons above the rank of location manager." (44 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		43
Number of persons who cast ballots	38	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		30

### APPLICATIONS FOR CERTIFICATION WITHDRAWN

**2384-82-R:** Service Employees International Union, Local 219, AFL, CIO, CLC, (Applicant) v. Modern Building Cleaning, Division of Dustbane Enterprises Ltd., (Respondent).

**2402-82-R:** Robert Holt, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. Mason Windows Limited, (Intervener).

**2404-82-R:** The Canadian Union of Public Employees, (Applicant) v. The Mississauga Public Library, (Respondent).

**2411-82-R:** Service Employees Union, Local 204, affiliated with AFL, CIO, CLC, (Applicant) v. Heutinck Nursing Homes Ltd., (Hilltop Manor), (Respondent).

**2479-82-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Cochrane Courts System, (Respondent).

**2489-82-R:** Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Applicant) v. Sutton Place Hotel, (Respondent).

**2562-82-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. G. S. Wark Limited, (Respondent) v. Construction Workers Local 6, affiliated with the Christian Labour Association of Canada, (Intervener).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1274-82-R:** Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Colorspan Buildings Limited, Duntri Construction, P.D.C. Investments Ltd., Tripp Construction Limited, Tripp Construction (Oshawa) Limited, 500869, Ontario Inc., carrying on business as Jonroy Construction and Dunedin Construction Limited, (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of its affiliated Locals 183, 247, 491, 493, 506, 527, 607, 625, 749, 837, 1036, 1059, 1081, and 1089, (Interveners). (*Withdrawn*). (Note Duntri Construction (*Granted*)).

**1834-82-R:** Canadian Union of Public Employees Local 79, (Applicant) v. The Corporation of the City of Toronto Sesquicentennial Board, (Respondents). (*Granted*)

**2356-82-R:** London and District Service Workers' Union, Local 220, SEIU, CIO, AFL, CLC, (Applicant) v. Nel-Gor Castle Nursing Home and Rest Home, (Respondent). (*Withdrawn*)

**2448-82-R:** United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. London Acoustics Ltd., and Interior Construction Systems of Western Ontario, (Respondent). (*Withdrawn*)

## SALE OF A BUSINESS

**1835-82-R:** Canadian Union of Public Employees, Local 79, (Applicant) v. The Corporation of the City of Toronto and Toronto Sesquicentennial Board, (Respondents). (*Granted*)

**1274-82-R:** Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Colorspan Buildings Limited, Duntri Construction, P.D.C. Investments Ltd., Tripp Construction Limited, Tripp Construction (Oshawa) Limited, 500869 Ontario Inc., carrying on business as Jonroy Construction and Dunedin Construction Limited, (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of its affiliated Locals 183, 247, 491, 493, 506, 527, 607, 625, 749, 837, 1036, 1059, 1081 and 1089, (Interveners). (*Granted*) with respect to Tripp Construction Limited, and Duntri Construction.



**2197-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Ottawa Taxi Holdings Limited, (Respondent) v. C.U.O.E. & G.W., (Intervener). (*Granted*)

**2270-82-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Maple Leaf Taxi Company Ltd., (Respondent). (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1569-82-R:** K. R. Collier, (Applicant) v. Commercial Workers Union Local 486, (Respondent) v. Hofmann Balancing Techniques Ltd., (Intervener).

Unit: "all employees of the intervener at Belleville, Ontario save and except foreman, persons above the rank of foreman, office and sales staff." (*Granted*)

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		7

**1902-82-R:** Walter E. Harris, (Applicant) v. Teamsters Local Union No. 230, Ready Mix Building Supply, Hydro and Construction Drivers, (Respondent).

Unit: "all employees of Building Products of Canada Limited at its Rexdale Warehouse, save and except foremen, persons above the rank of foreman, office and sales staff, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (*Granted*)

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

**2248-82-R:** David Delville, (Applicant) v. Ontario Public Service Employees Union, (Respondent). (*Granted*)

**2308-82-R:** Linda Agter, (Applicant) v. Labourers' International Union of North America, Local 837, (Respondent) v. The Ressel Day Nursery School Inc., (Intervener). (*Granted*)

**2416-82-R:** MI Movers International Transport Services Ltd., (Applicant) v. Teamsters Local Union 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. Group of Employees, (Interveners). (*Terminated*).

**2506-82-R:** Peter Lacelle and others as per attached documents, (Applicants) v. International Union of Electrical, Radio and Machine Workers, AFL, CIO, CLC, and its Local 547A, (Respondent) v. Regional Home Appliance Service Limited, (Intervener). (*Granted*)

## REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

**1831-82-M:** Hamilton Civic Hospitals, (Employer) v. Canadian Union of Public Employees, Local 794, (Trade Union). (*Granted*)

**2214-82-M:** Canada Safeway Limited, (Employer) v. Commercial Workers Union, Local 486, (Trade Union). (*Granted*)

**2497-82-M:** Mack Glass (1982) Limited, (Employer) v. Chatham Construction Workers Association, Local No. 53 affiliated with the Christian Labour Association of Canada, (Trade Union). (*Terminated*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**2441-82-R:** Unifin, Division of Keeprite Inc., (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America – U.A.W. Local 27, J. Young, A. J. Lansing and R. H. Mason in their personal capacities as union committee members, and employees as set out in Schedule “A” attached, (Respondents). (*Granted*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

**1840-82-U:** Master Insulators Association of Ontario Inc., (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Barry McQueen, Robert Beamish and W. Besterd Plumbing, Heating and Mechanical (1981) Ltd., (Respondents). (*Dismissed*)

**2610-82-U; 2611-82-U:** Marcotte Mechanical (Eastern) Limited, (Applicant) v. Sheet Metal Workers Union Local 537 & 568 and Philip Trottier, (Respondents). (*Withdrawn*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**0058-82-U:** The Greater Northern Ontario Trucking Association, (Complainant) v. TCG Materials Limited, (Respondent). (*Dismissed*)

**0718-82-U:** United Steelworkers of America, (Complainant) v. Montebello Metal Inc., (Respondent). (*Withdrawn*)

**0831-82-U:** Canadian Union of Operating Engineers & General Workers, Local 111, (Complainant) v. M & O Bus Lines (Handicab) Ltd., (Respondent). (*Dismissed*)

**1059-82-U; 1124-82-U:** International Association of Machinists and Aerospace Workers, (Complainant) v. Schwarzkopf Limited, (Respondent). (*Withdrawn*)

**1244-82-U:** Canadian Union of Public Employees, (Complainant) v. Streamway Villa Nursing Home, (Cobourg, Ontario), (Respondent). (*Withdrawn*)

**1333-82-U:** Phillip Wayne Bradley, (Complainant) v. Canadian Paperworkers Union, Local 212, (Respondent). (*Granted*)

**1338-82-U:** Joseph MacIsaac, (Complainant) v. U. A. Plumbers and Pipefitters Local 463, (Respondent). (*Withdrawn*)

**1412-82-U:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Scott's Restaurants, A Division of Scott's Hospitality Inc., (Respondent). (*Dismissed*)

**1497-82-U:** United Food and Commercial Workers' International Union, Local 175, (Complainant) v. Huntsville IGA, (Respondent). (*Withdrawn*)

**1527-82-U:** Phillip Uterreiner Jr., (Complainant) v. Catalytic Enterprises Ltd. & AF of L Plumbers, Pipefitters & Welders, Local 633, (Respondents). (*Dismissed*)

**1579-82-U:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Sundance Cookies Ltd., (Respondent). (*Granted*)

**1596-82-U:** United Food and Commercial Workers' International Union, Local 175, (Complainant) v. Huntsville IGA, (Respondent). (*Withdrawn*)

**1601-82-U:** Erwin Fisher, (Complainant) v. Ontario Taxi Association, Local 1688 CLC, (Respondent) v. Blue Line Taxi Company Limited, (Employer). (*Dismissed*)

**1715-82-U:** Joseph R. Strong, (Complainant) v. United Steelworkers of America, Local 1005, (Respondent) v. Stelco Inc., (Intervener). (*Granted*)

**1793-82-U:** Christian Labour Association of Canada, (Complainant) v. Peter Nursing Home Limited, carrying on business as Heritage Manor Rest Home, and Marian Peter, (Respondents). (*Granted*)

**1833-82-U:** Ontario Public Service Employees Union, (Complainant) v. The Board of Education for The City of Toronto, (Respondent). (*Dismissed*)

**1864-82-U:** Soft Drink Workers Joint Local Executive Board, (Complainant) v. Seven-Up Canada Inc., (Respondent). (*Withdrawn*)

**1893-82-U:** United Brotherhood of Carpenters and Joiners of America, (Complainant) v. The Corporation of the City of Brockville, (Respondent). (*Withdrawn*)

**2268-82-U:** Amalgamated Clothing and Textile Workers Union and its Local 1591, (Complainant) v. The Stewart Group Ltd., (Respondent). (*Withdrawn*)

**2274-82-U:** Carmen Pantalone, (Complainant) v. Bricklayers, Masons Independent Union of Canada, Local 1, (Respondent). (*Dismissed*)

**2276-82-U:** George Tucker, (Complainant) v. Local 6791, United Steelworkers of America, (Respondent) v. Butlers Manufacturing Company, (Intervener). (*Withdrawn*)

**2284-82-U:** The Association of Allied Health Professionals: Ontario, (Complainant) v. Middlesex-London District Board of Health, (Respondent). (*Withdrawn*)

**2292-82-U:** Professional Clerical Workers of Canada, (Complainant) v. Franklin Power, Terrance McKinnon et al, (Respondents). (*Withdrawn*)

**2310-82-U:** William Vis, (Complainant) v. United Steelworkers of America, Local 6791, (Respondent). (*Withdrawn*)

**2323-82-U:** Pierre Duval, (Complainant) v. United Steelworkers of America, Local 8626, (Respondent). (*Withdrawn*)

**2327-82-U:** Food and Service Workers of Canada, (Complainant) v. Abbey National Holdings (carrying on business as Abbey Carpet Cleaning Service), (Respondent). (*Withdrawn*)

**2330-82-U:** Ontario Nurses' Association, (Complainant) v. Belleville General Hospital, (Respondent). (*Withdrawn*)

**2335-82-U:** Martin Henning, (Complainant) v. United Steelworkers of America, (Respondent). (*Withdrawn*)

**2349-82-U:** Adolphus Spooner, (Complainant) v. Canadian Union of Operating Engineers & General Workers Local 101, (Respondent). (*Withdrawn*)

**2379-82-U:** Graphic Arts International Union, Local 211, (Complainant) v. Parr's Print & Litho Limited, (Respondent). (*Withdrawn*)

**2387-82-U:** Canadian Union of Operating Engineers & General Workers, (Complainant) v. Blue Line Taxi Company Limited, (Member of the Ottawa Owners and Brokers Association), (Respondent). (*Withdrawn*)

**2388-82-U:** Glenn Raymond Marden, (Complainant) v. Local 540, Bob Flood (Sheet Metal Workers International), (Respondent). (*Withdrawn*)

**2391-82-U:** Mark McKeon, (Complainant) v. Labourers International Union Local 1267, (Respondent) v. 268121 Ontario Limited, (Intervener). (*Dismissed*)

**2398-82-U:** International Ladies' Garment Workers' Union, (Complainant) v. The Sigal Shirt Company Limited, Sydney Levy, A. Lopardo, L. Martellacci, (Respondents). (*Withdrawn*)

**2399-82-U:** Service Employees International Union, Local 183, (Complainant) v. Quintech, Division of Lab-Volt (Quebec) Ltd., (Respondent). (*Withdrawn*)

**2405-82-U:** Retail Clerks Union, Local 409, (Complainant) v. White Otter Inns Limited, (Respondent). (*Withdrawn*)

**2407-82-U:** Retail, Wholesale and Department Store Union, (Complainant) v. Knob Hill Farms Ltd., (Respondent). (*Withdrawn*)

**2417-82-U:** Thomas Brason and R. J. Clulow, (Complainant) v. United Steelworkers of America, Local 2251, (Respondent). (*Withdrawn*)

**2431-82-U:** Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Complainant) v. The Sherway Inn, (Respondent). (*Withdrawn*)

**2434-82-U:** Labourers' International Union of North America, Local 183, (Complainant) v. Peel Condominium Corporation No. 143, (Respondent). (*Withdrawn*)

**2437-82-U:** Gaetano Scala, (Complainant) v. Local 183 c/o Murray G. Bulgar, (Respondent). (*Withdrawn*)

**2444-82-U:** Service Employees International Union, Local 183, (Complainant) v. Quintech, Division of Lab-Volt (Quebec) Ltd., (Respondent). (*Withdrawn*)



- 2456-82-U:** Retail Clerks Union, Local 409, (Complainant) v. White Otter Inns Limited, (Respondent) (*Withdrawn*)
- 2458-82-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 673, (Complainant) v. DeHavilland Aircraft of Canada Limited, (Respondent). (*Withdrawn*)
- 2487-82-U:** Thomas Theofilopoulos, (Complainant) v. Hotel, Restaurant, and Cafeteria Employees Local 75, (Respondent). (*Withdrawn*)
- 2491-82-U:** John Overholt, (Complainant) v. Labourers International Union 1267, (Respondent). (*Withdrawn*)
- 2504-82-U:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Ontario Dye Company Limited, (Respondent). (*Withdrawn*)
- 2510-82-U:** R. Prashad, (Complainant) v. United Steelworkers of America, and McGraw Edison Ltd., (Respondents). (*Withdrawn*)
- 2518-82-U:** Labourers' International Union of North America, Local 183, (Complainant) v. York Condominium Corporation No. 482, (Respondent). (*Withdrawn*)
- 2525-82-U:** Service Employees' International Union, Local 204, (Complainant) v. Parkdale Nursing Home (1975) Limited, (Respondent). (*Withdrawn*)
- 2534-82-U:** Norman Delong, (Complainant) v. Phil Bennett – Chairman Local 222, UAW Bargaining Unit, (Respondent). (*Withdrawn*)
- 2535-82-U:** Herbert Clark, (Complainant) v. Phil Bennett – Chairman Local 222, UAW Bargaining Unit, (Respondent). (*Withdrawn*)
- 2536-82-U:** William G. Byng, (Complainant) v. Phil Bennett – Chairman Local 222, UAW Bargaining Unit, (Respondent). (*Withdrawn*)
- 2537-82-U:** Martin V. Molloy, (Complainant) v. Phil Bennett – Chairman Local 222, UAW Bargaining Unit, (Respondent). (*Withdrawn*)
- 2538-82-U:** James Champagne, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)
- 2539-82-U:** John Glennie, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)
- 2540-82-U:** David Haslam, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)
- 2541-82-U:** Robert F. Slack, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)
- 2542-82-U:** Maurice Timoll, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)
- 2543-82-U:** Robert Kenneth Roman, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2544-82-U:** John Tendam, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2546-82-U:** M. Sirizzotti, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2552-82-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 51, (Complainant) v. 414594 Ontario Limited carrying on business as Thrifty Donut Shop, (Respondent). (*Withdrawn*)

**2556-82-U:** Norbert Zunker, (Complainant) v. General Mills, (Respondent). (*Dismissed*)

**2566-82-U:** Walter Henderson, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2567-82-U:** Joseph D. Waldinsperger, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2570-82-U:** James Pearce, (Complainant) v. The Canadian Union of Public Employees and its Local 87, (Respondent). (*Withdrawn*)

**2572-82-U:** John Lambert, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2573-82-U:** John Vandermeer, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2579-82-U:** Canadian Union of Operating Engineers & General Workers, (Complainant) v. Midmetro Plastics Limited, (Respondent). (*Withdrawn*)

**2586-82-U:** Canadian Union of Public Employees, Local 2387, (Complainant) v. Charterways Transportation Limited, (Respondent). (*Withdrawn*)

**2588-82-U:** Alan Campbell, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2589-82-U:** Edmond A. Gervais, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2590-82-U:** Wayne R. Knight, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2591-82-U:** George A. Wilson, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2592-82-U:** Fred Stefantschitsch, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2593-82-U:** Wallace Hogg, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2594-82-U:** Guy Lahaye, (Complainant) v. Phil Bennett – Chairman Local 222, U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2596-82-U:** Wm. G. Nicholson, (Complainant) v. Phil Bennett – Chairman Local 222 U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2598-82-U:** Winston Deshane, (Complainant) v. Phil Bennett – Chairman Local 222 U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2599-82-U:** Gordon W. Smale, (Complainant) v. Phil Bennett – Chairman Local 222 U.A.W. Bargaining Unit, (Respondent). (*Withdrawn*)

**2625-82-U:** William Lavigne, (Complainant) v. International Brotherhood of Painters & Allied Trades Local 1904 and C.H. Heist Ltd. (Canada), (Respondent). (*Withdrawn*)

**2634-82-U:** Ronald Brown, (Complainant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters Union Local 938), (Respondent). (*Withdrawn*)

### **APPLICATIONS FOR CONSENT TO PROSECUTE**

**2495-82-U:** Canadian Union of Public Employees and its Local 1854, (Applicant) v. Country Place Nursing Home, (Respondent). (*Withdrawn*)

### **APPLICATIONS FOR RELIGIOUS EXEMPTION**

**2418-82-M:** Wayne R. Roth, (Applicant) v. Energy and Chemical Workers' Union, Local 53, (Respondent Trade Union) v. Maple Leaf Mills Ltd., (Respondent Employer). (*Dismissed*).

### **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**2395-82-M:** Rockwell International of Canada Ltd., (Employer) v. United Automobile, Aerospace, and Agricultural Implement Workers of America (U.A.W.), Local 127 and 1067, (Trade Union). (*Granted*)

### **APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS**

**0466-28-M:** Ontario Dairy Herd Improvement Corporation, (Applicant) v. Ontario Public Service Employees Union, (Respondent). (*Dismissed*)

**1534-82-M:** Service Employees Union, Local 219, (Applicant) v. Beacon Hill Lodges of Canada Ltd., (Respondent). (*Dismissed*)

**1681-82-M:** United Steelworkers of America, (Applicant) v. Montebello Metals Inc., (Respondent). (*Withdrawn*)

**1917-82-M:** Canadian Union of Public Employees, Local 2380, (Applicant) v. City of Barrie, (Respondent). (*Withdrawn*)

**2213-82-M:** Service Employees' Union, Local 210, (Applicant) v. Alexandra Marine & General Hospital, (Respondent). (*Withdrawn*)

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**2291-82-OH:** Sheet Metal Workers' International Association, Local Union #540, (Complainant) v. Selkirk Metalbestos, Oshawa, Ontario, (Respondent). (*Withdrawn*)

**2421-82-OH:** Ken Evraire, (Complainant) v. Corporation of the City of Ottawa, (Respondent). (*Withdrawn*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**2641-81-M:** The IBEW Construction Council of Ontario, and the International Brotherhood of Electrical Workers, Local 594, (Applicant) v. The Electrical Contractors Association of Ontario, and Ron Pleau Electric Ltd., (Respondents). (*Terminated*).

**0217-82-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Oliver Comisso & Son Limited, (Respondent). (*Withdrawn*)

**0745-82-M:** United Brotherhood of Carpenters and Joiners of America, Local Union No. 414, (Applicant) v. New Vision Construction Limited, (Respondent). (*Dismissed*)

**1484-82-M:** International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local (1684), (Applicant) v. Joseph Zuliani Limited carrying on business as Zuliani Glass, (Respondent). (*Withdrawn*)

**1528-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 93 and Local 2041, (Applicants) v. T.O.B. Construction Limited, (Respondent). (*Dismissed*)

**1830-82-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 721, (Applicant) v. Raymond Steel Ltd., (Respondent). (*Withdrawn*)

**1836-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 2222, (Applicant) v. Crystaplex Plastics Ltd., (Respondent). (*Withdrawn*)

**1875-82-M:** United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council, (Applicant) v. Duntri Construction Ltd., (Respondent). (*Withdrawn*)

**1898-82-M:** International Brotherhood of Painters and Allied Trades, Local 205, (Applicant) v. Eastern Sandblasting & Painting Ltd., (Respondent). (*Granted*)

**1918-82-M:** Sheet Metal Workers' International Association Local Union #285, (Applicant) v. Residential Sheet Metal Contractors Organization and Rexdale Heating Ltd., (Respondents). (*Granted*)

**2205-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Cornerstone Construction Ltd., (Respondent). (*Withdrawn*)

**2206-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bradsil Ltd., (Respondent). (*Granted*)

**2222-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its Affiliate Arlington Crane Service Ltd., (Respondent). (*Granted*)



**2244-82-M:** The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*)

**2281-82-M:** Labourers' International Union of North America, Local 1089, (Applicant) v. MHG-DB-Catalytic, (Respondent). (*Withdrawn*)

**2288-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Losereit Sales and Services Ltd., (Respondent). (*Dismissed*)

**2290-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Golden Construction Co., A Division of 506878 Ontario Limited, (Respondent). (*Withdrawn*)

**2297-82-M:** Labourers' International Union of North America, Local 1089, (Applicant) v. MHG-DB-Catalytic Joint Venture, (Respondent). (*Withdrawn*)

**2298-82-M:** The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, (Applicant) v. C & M Carpentry, (Respondent). (*Granted*)

**2309-82-M:** The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Locals 27 and 1304, (Applicant) v. Elmara Construction Co. Limited, (Respondent). (*Granted*)

**2314-82-M:** The United Association Local Union 666, (Applicant) v. MHG International Ltd., (Respondent). (*Withdrawn*)

**2319-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Roko Construction Ltd., (Respondent). (*Withdrawn*)

**2321-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Malec Building Products Limited or Malec Acoustic & Drywall Ltd., (Respondents). (*Withdrawn*)

**2336-82-M:** Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. William Weishuhn Holdings Limited, carrying on business as Industrial Heating & Air Conditioning, (Respondent). (*Withdrawn*)

**2344-82-M; 2345-82-M:** United Brotherhood of Carpenters and Joiners of America, (Applicant) v. K. A. Mace Limited, (Respondent). (*Granted*)

**2351-82-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Toronto Construction Association of Rock Engineering Limited, (Respondents). (*Withdrawn*)

**2352-82-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Dalacoustic Contractors Limited, (Respondent). (*Granted*)

**2357-82-M:** Labourers' International Union of North America, Local 527, (Applicant) v. P. J. Daley Contracting Limited, (Respondent). (*Withdrawn*)

**2358-82-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Ross D. Neill Limited, (Respondent). (*Granted*)

**2360-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Columbia Interior Cont., (Respondent). (*Withdrawn*)

**2361-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Yorkland Drywall and Acoustics Ltd., (Respondent). (*Withdrawn*)

**2372-82-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Ellis Don Limited, (Respondent). (*Withdrawn*)

**2377-82-M:** The United Association, Local Union 800, (Applicant) v. 471177 Ontario Limited, carrying on business as S & E Mechanical, (Respondent). (*Granted*)

**2380-82-M:** Clow Darling Mechanical Contractors Ltd., (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1669 Labourers' International Union of North America, Local 607, (Respondents). (*Terminated*).

**2381-82-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Joe Pantalone Masonry Limited, (Respondent). (*Withdrawn*)

**2427-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Keis Flooring, (Respondent). (*Withdrawn*)

**2430-82-M:** Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, (Applicant) v. P & R Concrete Finishing Co., a Division of 361870 Ontario Limited, (Respondent). (*Granted*)

**2432-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Climb Formwork, (Respondent). (*Granted*)

**2433-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Convention & Show Services, (Respondent). (*Withdrawn*)

**2446-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Wall Well Construction Limited, (Respondent). (*Granted*)

**2449-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. London Acoustics Ltd. and Interior Construction Systems of Western Ontario, (Respondent). (*Withdrawn*)

**2457-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. All-In-One General Contractors, (Respondent). (*Withdrawn*)

**2465-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. O.S.C. Partitions Inc., (Respondent). (*Withdrawn*)

**2466-82-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Aykroyd Contractors, (Respondent). (*Withdrawn*)

**2467-82-M:** The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, (Applicant) v. Luigi Calendana Carpenters, (Respondent). (*Withdrawn*)

**2469-82-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Piddi Design Associates Limited, The Exhibit & Display Association of Canada, (Respondent). (*Withdrawn*)

**2475-82-M:** International Brotherhood of Painters and Allied Trades, Local 205, (Applicant) v. Busch Painting Limited, (Respondent). (*Withdrawn*)

**2480-82-M:** Labourers' International Union of North America Local 183, (Applicant) v. Beton Concrete Forming Ltd., (Respondent). (*Granted*)

**2481-82-M:** Labourers' International Union of North America Local 183, (Applicant) v. Ontario Ltd. #403556, (Respondent). (*Withdrawn*)

**2500-82-M:** Sheet Metal Workers' International Association Local Union #285, (Applicant) v. Frank Winter Heating & Mechanical Inc., and Residential Sheet Metal Contractors Organization, (Respondents). (*Granted*)

**2507-82-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Rindfleisch Contracting Limited, (Respondent). (*Dismissed*)

**2509-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Arlington Crane Service Ltd., (Respondent). (*Granted*)

**2515-82-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Muzzo Brothers Limited, carrying on business under the firm name and style of Marel Contractors, (Respondent). (*Withdrawn*)

**2520-82-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Toronto Construction Association Midview Construction and Drain Limited, (Respondents). (*Granted*)

**2530-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Eagre Developments, (Respondent). (*Withdrawn*)

**2553-82-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Labour Relations Bureau of O.G.C.A. Traugott Construction Limited, (Respondent). (*Granted*)

**2561-82-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Dufresne Piling Company (1967) Ltd., (Respondent). (*Granted*)

**2564-82-M; 2565-82-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its Local 527, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondents). (*Withdrawn*)

**2608-82-M:** The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local Union 527, (Applicant) v. The Mechanical Contractors Association of Ontario and Lou Contracting Ltd., (Respondents). (*Withdrawn*)

**2621-82-M:** United Brotherhood of Carpenters & Joiners of America, Local 2041, (Applicant) v. Nick Giamberardino & Bros. Ltd., (Respondent). (*Granted*)

**2623-82-M:** United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Majestic Interior Systems, (Respondent). (*Granted*)

**2628-82-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Dangro Const. Service Ltd., (Respondent). (*Withdrawn*)

## **APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION**

**2026-81-M:** International Union of Elevator Constructors, Local #50, (Applicant) v. Beckett Elevator Company Limited, (Respondent) v. National Elevator and Escalator Association, (Intervener). (*Dismissed*)

**1588-82-R:** Ontario Public Service Employees Union, (Applicant) v. Ottawa General Hospital, (Respondent). (*Denied*).









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